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IN THE

Supreme Court of the United States

JAMES WAYBRIGHT, as personal representative and co-executor of the estate of Andrew Waybright (deceased); and SHIRLEY WAYBRIGHT, individually and as personal representative and co-executor of the estate of Andrew Waybright (deceased),

Petitioners,

v.

FREDERICK COUNTY, MARYLAND, DEPARTMENT OF FIRE & RESCUE SERVICES, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Lewis v. County of Sacramento*, 523 U.S. 833 (1998), the Court held that in some instances conduct involving more than negligence, but less than intentional conduct, could be "shocking" in the constitutional sense. Therefore, the Court concluded that deliberate indifference could be sufficient to maintain a substantive due process claim.

The Court in *Lewis* determined that in the specific context of a high-speed police pursuit resulting in the death of the pursued, only an "intent to harm" the plaintiff could shock the conscience in a due process challenge to executive action. The Court stated, however, that whether behavior rises to the level of conscience-shocking will depend upon the facts of each individual case.

The question presented in the instant case is:

Did the Fourth Circuit err when, in direct conflict with the Third, Sixth and Tenth Circuits, it followed the D.C. Circuit's rule that the deliberate indifference standard applies only in "special circumstances like custody"?

PARTIES TO THE PROCEEDINGS

The parties before this court are petitioners James Waybright and Shirley Waybright, personal representatives of the estate of Andrew Waybright ("Petitioners"). The respondents are Frederick County, Maryland, Department of Fire & Rescue Services, Jeffrey Coombe, Jan H. Gardner, David Gray, Andrew Marsh, Mark McNeal, Walter F. Murray, Stanley Poole, Terre Rhoderick, John L. Thompson, Jr. and Richard Welden ("Respondents").

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The opinion of the United States District Court for the District of Maryland was issued on March 1, 2007 and is reported at 475 F. Supp. 2d 542 (2007) (App. -23a-57a). The opinion of the United States Court of Appeals for the Fourth Circuit was issued on June 2, 2008 and is reported at 528 F.3d 199 (2008) (App. 1a-22a).

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on July 2, 2008. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The principal provisions involved are the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983 (2000), which are provided fully in the Appendix to the Petition. App. 58a-59a.

STATEMENT OF THE CASE

This case involves important questions concerning the viability of due process challenges to non-custodial executive action or state-created danger contexts where deliberate indifference is the conscience-shocking behavior involved.

A. *Background*

On July 3, 2002, Andrew Waybright, a 23–year-old firefighter recruit of Respondent Frederick County, Maryland, Department of Fire & Rescue Services (the "Fire Department") died of cardiac arrest induced by heat stroke. Mr. Waybright collapsed at the Respondent's training facility while undergoing training conducted by Respondent Jeffrey Coombe.

OSHA investigated this event and issued citations explicitly finding that the actions of the Fire Department and Coombe were "egregious" and "likely to cause death or serious physical harm." The Frederick County Sheriff's office conducted a criminal investigation into the matter. The County Board of Commissioners held a hearing to consider the conduct that led to Mr. Waybright's death. At the close of the evidence, one of the commissioners, Michael L. Cady (a Senior International Olympic Coach and former Marine drill instructor), had this to say about Coombe: "I can't believe criminal charges were not involved here . . . he would be hanged." An independent inquiry conducted by officials from fire departments throughout Maryland found scores of safety violations, some of which were deemed causative factors in Mr. Waybright's death and which led to the training facility being shut down for two years.

Coombe, with no formal training, certification, or education whatsoever in leading physical training, was assigned by the Fire Department to train recruits. He was not qualified for the position when hired and was given no training by the Fire Department on how to

carry out that assignment. Coombe conducted the training on the day of Andrew Waybright's death without any oversight from his superiors, Respondents here. The Fire Department officials later admitted under oath that they knew their training program was unsafe due to inadequate staffing, but nevertheless went forward with the training class. [1]

On the first day of training, July 2, 2002, Coombe gave a classroom lecture to the recruits in which he stressed the critical, life-sustaining importance of drinking water during any training performed outdoors in extreme heat. Yet, the following day, Coombe ran the recruits in extreme heat but gave them no water. "Code Red" weather had been predicted by the National Weather Service, however, Coombe never called for a local weather report (although he would later lie under oath that he had). The facility lacked an outdoor thermometer. During the training, the heat index soared to 96 degrees.

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[1] Respondent Marc McNeal who was responsible for supervising Fire Department training personnel, testified in deposition:

> Q. [Y]ou knew, Chief McNeal, that there would be with that short staff of instructors more than a mere likelihood that being short staffed could present a safety issue, is that a fair statement?
>
> A. Yes, that's a fair statement, and I would state that the reason, one of the reasons that concern was brought to both Director Poole and Marsh was safety related.

The recruits could not bring their own water bottles on the physical field training course because they were cumbersome one-gallon jugs. Furthermore, it was a Fire Department practice for a vehicle carrying water to accompany the recruits during outdoor exercises, along with two other items of importance in the event of an emergency: first aid equipment and communications equipment. On this day, however, Coombe elected to leave them all in the garage.

It was likewise a Fire Department practice to have the recruits led on the rigorous training by an instructor *and* followed by a second instructor — the latter being poised to observe any difficulty encountered by a trainee. On this day, however, Coombe decided not to bring a second instructor and ran *ahead* of his trainees.

The thirteen recruits began with a half-mile walk. After the walk, they embarked on a 3.5-mile run, interrupted by a session of one hundred (100) jumping jacks, fifty (50) pushups, twenty (20) crunches, twenty (20) lunges, twenty (20) squats, sit-ups and leg lifts. Following the run and the calisthenics, Recruit Jeff Buchanan was so "disoriented that he thought he had run part of the course twice." Recruit Bernard Simpson nearly lost consciousness. Recruit Michael Leonard was dizzy and nauseous but too dehydrated to vomit. Recruit Adam Steinberg had trouble breathing. Recruit James Davis, also winded, simply could not keep up. Mr. Waybright, showing signs of heat exhaustion, could not raise his feet and legs properly. He struggled when the men resumed running and fell to the rear of the pack.

As the temperature and humidity climbed to deadly levels, Coombe made the trainees run wind sprints three hundred (300) feet uphill. Trainees who failed to stay in formation were ordered to stop, do punitive push-ups and descend the hill to start the climb again at the bottom. With the heat index now at 96 degrees, Mr. Waybright and six other recruits lagged behind, all showing signs of heat exhaustion. Finally, Waybright collapsed.

In his near-death state, Mr. Waybright said, "I want to finish with my class" and soon became unconscious. Help could not be summoned because Coombe had chosen to leave all communications equipment behind.

Mr. Waybright's core body temperature was found to be 107.5 degrees. Mr. Waybright died an hour later. An autopsy showed that he had died of cardiac arrest induced by heat stroke. He had had no preexisting cardiac disease.

B. *Proceedings in the Maryland Circuit Court*

On March 9, 2004, Petitioners filed a complaint in the Circuit Court for Frederick County, Maryland. Petitioners sued Coombe, the Fire Department and various Department supervisors. The complaint asserted wrongful death, survival and loss of solatium claims.

On July 14, 2004, Respondents filed a motion for summary judgment. Thereafter, the trial court granted summary judgment on the state tort survivorship claims (because the Maryland Workers' Compensation Act's

exclusivity clause barred them) and deferred ruling on the wrongful death summary judgment motion, asserted on the same grounds.

On December 10, 2004, Petitioners filed an amended complaint adding federal and state constitutional claims. Invoking federal question jurisdiction, Respondents removed the case to the U.S. District Court of Maryland.

C. *Proceedings in Federal District Court*

In the district court, Petitioners proceeded on three types of claims. First was a 42 U.S.C. § 1983 (2000) ("§ 1983") claim, premised on Mr. Waybright's substantive due process right to life and directed against Coombe, the Fire Department supervisors and members of the Frederick County Board of Commissioners ("Frederick County"). With respect to Coombe, the claim stemmed from his conduct (described above) which was alleged to be "deliberately indifferent" and "grossly negligent"; as to the other Respondents, the causes of action stemmed from their supervisory role in creating the conditions that led to Mr. Waybright's death. Second was a state constitutional claim, based on Article 24 of the Maryland Declaration of Rights ("no man ought to be . . . deprived of his life, liberty or property, but by . . . the Law of the land") and directed against Coombe, the Fire Department supervisors and Frederick County. Third were the remaining state wrongful death tort claims against Coombe, the supervisors at the Fire Department, and Frederick County.

D. *The Federal District Court's Decision*

Following discovery, Respondents moved for summary judgment and, in March 2007, the district court granted it with respect to both Petitioners' federal and state constitutional claims, and remanded the remaining tort claim to the Circuit Court for Frederick County for resolution of the pending motion for summary judgment.

With respect to their § 1983 claim, Petitioners argued that Coombe's conduct should be measured by the deliberate indifference standard and relied on *Estate of Owensby v. City of Cincinnati*, 414 F.3d 596 (6th Cir. 2005), *cert. denied*, 547 U.S. 1129 (2006) for support. The district court read *Estate of Owensby* as follows: "In that case, the United States Court of Appeals for the Sixth Circuit suggested that the amount of time available for actual deliberation is a critical element in deciding whether to apply the intent-to-harm standard or the deliberate-indifference standard." (App., *infra*, 44a-45a).

The district court, however, refused to apply the deliberate indifference standard because: (1) "[t]he Fourth Circuit does not appear to have adopted the approach taken in the *Owensby* decision" and (2) "decisions invoking this theory strongly suggests that it only applies in the custodial or state-created danger context. *See Fraternal Order of Police v. Williams*, 375 F.3d 1141, 1146 (D.C. Cir. 2004) ("The opportunity for deliberation alone is not sufficient to apply the lower threshold to substantive due process claims. Instead, it

is '[b]ecause of . . . special circumstances' like custody that 'a State official's deliberate indifference . . . can be truly shocking.'"). (App., *infra*, 45a, 49a-50a).

The district court thus concluded: "[T]he appropriate standard for measuring the conduct of Coombe is the higher intent-to-harm standard, not the lower deliberate-indifference standard [and] only if Petitioners can establish that Coombe intended to injure Waybright could the governmental conduct at issue be said to 'shock the conscience.'" (App., *infra*, 50a). The district court rejected Petitioners' state-created danger claim because "there is no suggestion in this case that Waybright was affirmatively forced to participate in the training exercise that resulted in his untimely and tragic death." (App., *infra*, 48a).

The district court also reasoned that the federal due process analysis should control the state Article 24 analysis, citing the Maryland Court of Appeals for the proposition that the two constitutional provisions are "*in pari materia*, such that the interpretations of the Due Process Clause of the Fourteenth Amendment provided by the United States Supreme Court serve as persuasive authority for Article 24." (App., *infra*, 47a n.7). Finally, as to Petitioners' state tort claims, the district court declined to exercise supplemental jurisdiction and remanded them to state court for resolution on the pending motion for summary judgment. (App., *infra*, 55a). Petitioners timely appealed. (App., *infra*, 7a)

E. *The Court of Appeals' Decision*

The court's recitation of the facts omitted many important facts noted by Petitioners here and below. The court of appeals followed the district court's reasoning with respect to the deliberate indifference standard (*vis-'a-vis* whether the deliberately indifferent party had time to consider fully the potential consequences of his conduct). Like the district court, the court of appeals rejected the Sixth Circuit's view on this point announced in *Estate of Owensby*. (App., *infra*, 13a-14a). Instead of aligning itself with the Sixth, Third and Tenth Circuits, the court of appeals followed the D.C. Circuit in its reckoning "'that the opportunity for deliberation alone is not sufficient to apply' a lower bar to substantive due process claims." (App., *infra*, 14a) citing *Fraternal Order of Police Dep't of Corr. Labor Comm. v. Williams*, 375 F.3d 1141, 1146 (D.C. Cir. 2004).

As additional support for its holding, the court of appeals likened this case to *Collins v. City of Harker Heights*, 503 U.S. 115 (1992), where the Court held that due process does not require municipalities to provide their employees with a safe workplace or warn them of risks of harm. (App., *infra*, 14a). Next, the court of appeals offered a host of theoretical, rhetorical questions that supposedly point to the imponderable nature of assessing a Respondent's ability to deliberate before doing wrong:

> The time to deliberate theory is also difficult to apply. What part of the challenged conduct matters? Does the opportunity to deliberate begin months or weeks before an accident, the

> night before, or at the time events unfolded? This question would emerge in many cases besides Waybright's because longstanding conditions often lead to rapidly unfolding harm. Also, when has one had enough time to deliberate? What kind of prior notice of potential danger causes the deliberative duty to kick in? These and other questions have real litigious potential. Indeed, they threaten more cases like the present one, where confusion over what belongs in state and what in federal court leads to delay for Petitioners in getting relief and uncertainty for Respondents in finding out if liability attaches. (App., *infra*, 14a).

Relying on *Collins*, the court of appeals likewise rejected Petitioners' state-created danger claim. (App., *infra*, 17a).

The court of appeals did, however, hold that the district court "erred in passing on the merits of plaintiffs' [Maryland Constitution] Article 24 claim" and remanded it to the Maryland trial court for adjudication there. (App., *infra*, 20a-21a).

REASONS FOR GRANTING THE PETITION

I. *CERTIORARI* SHOULD BE GRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS IN *LEWIS* AND *COLLINS*.

A. *Lewis v. County of Sacramento*

The court of appeals' decision misapplied the holding in *Lewis*. The Court granted *certiorari* in *Lewis* to resolve a conflict among the circuits as to the standard of culpability for due process violations in the context of a police chase. *Lewis*, 523 U.S. at 839. In *Lewis*, the Court held that generally, in a due process challenge to executive action, the threshold question is whether the government officer's actions "shock the contemporary conscience." *Id.* at 847. The Court determined that in the specific context of a high-speed police pursuit, only an "intent to harm" the plaintiff could shock the conscience. *Id.* at 854. However, the Court explicitly stated that whether behavior rises to the level of conscience-shocking will depend upon the facts of each individual case. *Id.* at 850.

The Court stated that in some instances, conduct involving more than negligence, but less than intentional conduct, could be "shocking" in the constitutional sense. Therefore, deliberate indifference, or perhaps gross negligence or recklessness, could be sufficient. *Id.* at 849-50. In discussing the importance of context, the Court compared a high-speed chase or a prison riot on one hand with decisions regarding the medical needs of prisoners on the other. *Id.* at 849-52. In the latter

situation, deliberate indifference to the medical needs of prisoners would likely be sufficient because the state actor could engage in "actual deliberation" and "unhurried judgments."[2] *Id.* at 851, 853. In the former situation, where deliberation is impossible, the higher standard of "intent to harm" would be required. *Id.* at 854.

The problem with the Fourth Circuit's decision, which adopted the rationale of the D.C. Circuit in *Fraternal Order of Police*, is that *both* would restrict the viability of a substantive due process claim grounded in deliberate indifference to situations where the plaintiff is in the state actor's custody. This, of course, runs completely afoul of both the *Lewis* holding and the decisions of the Third, Sixth and Tenth circuits, that deliberate indifference can shock the conscience in various circumstances where there is not a custodial relationship or there is a state-created danger.

B. *Collins v. City of Harker Heights*

The court of appeals' opinion likewise misapplied the Court's holding in *Collins*. A central theme of the court

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[2] In *Lewis*, the Court made clear that "actual deliberation" means more than having a few seconds to think: "By 'actual deliberation,' *we do not mean* 'deliberation' in the narrow, technical sense in which it has sometimes been used in traditional homicide law." *See, e.g., Caldwell v. State*, 203 Ala. 412, 84 So. 272, 276 (Ala. 1919) (noting that "deliberation here does not mean that the man slayer must ponder over the killing for a long time;" rather, "it may exist and may be entertained while the man slayer is pressing the trigger of the pistol that fired the fatal shot[,] even if it be only for a moment or instant of time")." 523 U.S. at 851 n. 11 (emphasis in original).

of appeals' opinion is that Petitioners' case rests upon allegations of an unsafe work environment and therefore is not actionable under *Collins*. (App., *infra*, 17a-18a). Specifically, the court of appeals reasoned: "In holding that due process does not require governmental employers to provide a safe workplace, but that state tort law may, the Court [in *Collins*] necessarily rejected the time to deliberate theory for employers most often have time to deliberate about workplace conditions." (App., *infra*, 14a).

In *Collins*, a city sanitation department worker, untrained in appropriate safety practices by the city, died of asphyxia after entering a manhole to clear a sewer line. His widow brought a § 1983 action against the city on the theory that her husband "had a constitutional right to be free from unreasonable risks of harm to his body, mind and emotions and had a constitutional right to be protected from the City of Harker Heights' custom and policy of deliberate indifference toward the safety of its employees." *Collins*, 503 U.S. at 117. The Court rejected the safe workplace claim: "Neither the text nor the history of the Due Process Clause supports [a] claim that the governmental employer's duty to provide its employees with a safe working environment is a substantive component of the Due Process Clause." *Id.* at 126. Petitioners do not take issue with this — Petitioners' claim is not predicated on a supposed entitlement to a safe workplace.

This case concerns Mr. Waybright's right *not* to be *affirmatively* injured by a state actor. "One of the less controversial aspects of the due process clause is its implicit prohibition against a public officer's

intentionally killing a person, or seriously impairing the person's health, without any justification." *See K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 848 (7th Cir. 1990) (Posner, J.) citing *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989); *Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982). "The right to be free from this kind of governmental oppression . . . is among the "negative liberties" that the due process clause of the Bill of Rights and the Fourteenth Amendment has been held to protect." *K.H. ex rel. Murphy*, 914 F.2d at 848. Thus, due process liability is triggered where, as here, the government *affirmatively* acts to deprive a citizen of a constitutional right. Unlike *Collins*, this is *not* a case in which the Respondents simply failed to make adequate safety preparations.

All of these points are illustrated by *Jensen v. City of Oxnard*, 145 F.3d 1078 (9th Cir.), *cert. denied*, 525 U.S. 1016 (1998) — a case which is in direct conflict with the Fourth Circuit's decision in the instant case. There, police officer Jensen was shot and killed by a fellow officer, Sergeant Christian, during a SWAT team raid. *Id.* at 1081-82. Officer Jensen's widow brought a § 1983 action against Sergeant Christian, the police chief and the city. She further alleged that her husband's civil rights were violated when he was shot and killed.

In her complaint, Mrs. Jensen alleged that the "City of Oxnard: (1) failed to adequately train or equip the members of the SWAT team; (2) failed to control those members of the SWAT team who have a known propensity for violence; and (3) failed to investigate SWAT team members for potential substance abuse and/or mental problems." *Id.* at 1083. The complaint

specifically alleged "that the police chief, assistant police chief, and police commander assigned Sergeant Christian to the SWAT team 'knowing that he was using mind-altering drugs.'"[3] *Id.* Defendants moved to dismiss the complaint on the ground that it failed to state a claim upon which relief could be granted based on the same arguments advanced below by the instant Respondents. *Id.* The district court denied the motion and defendants appealed.

The Ninth Circuit concluded that the "complaint adequately states a cause of action

> [because] it alleges that Oxnard violated Officer Jensen's Fourth and Fourteenth Amendment rights in two respects: (1) Sergeant Christian used excessive and unreasonable deadly force; and (2) the City of Oxnard and various officials in the Oxnard Police Department acted with *deliberate indifference* to the maintenance, training, and control of its SWAT teams, and that indifference was a proximate cause in Sergeant Christian's violation of Officer Jensen's constitutional rights.

Id. at 1082-83 (emphasis supplied). "In other words, Jensen alleges that Sergeant Christian was *highly likely* to inflict the particular injury suffered by Officer Jensen

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[3] These allegations, the court concluded, were "sufficient to allege a plausible link between the policymaker's inadequate decision and the particular injury alleged." *Jensen*, 145 F.3d at 1083.

as a result of Oxnard's deliberate indifference towards the staffing and training of its SWAT teams" (quotation marks omitted). *Id.* at 1083.

Citing Collins, the *Jensen* defendants argued (just as the instant Respondents did below) that "Officer Jensen could not have had any of his rights violated because he was injured while performing his duties as a police officer." *Id.* The court rejected defendant "Oxnard's attempt to turn this into a safe workplace case." *Id.* at 1083-84. The court reasoned that "[a]lthough this case is similar to the safe workplace cases in that they both concern individuals who 'voluntarily accepted . . . an offer of employment,' [*Collins*, 503 U.S. at 128] this case is different in one significant way — the nature of the injury alleged." *Id.* at 1084. **"While the safe workplace cases concern the failure of the state adequately to train, prepare, or protect government employees from non-state actors, this case involves the allegedly intentional or reckless acts of a government employee directed against another government employee."** *Id.* (footnote omitted, emphasis supplied.)

See also Hawkins v. Holloway, 316 F.3d 777, 787 (8th Cir. 2003) ("T]he facts demonstrate that the sheriff deliberately abused his power by threatening deadly force as a means of oppressing those employed in his department, thus elevating his conduct to the arbitrary and conscience shocking behavior prohibited by substantive due process."); *see also Eddy v. Virgin Islands Water and Power Authority*, 955 F.Supp. 468, 475, *reconsidered*, 961 F.Supp. 113 (D. VI. 1997).

The bottom line is this: Petitioners' position is that substantive due process claims only extend to those cases where the state actor has taken affirmative steps, with the knowledge that those actions create a danger to the plaintiff, or is deliberately indifferent to that danger. Petitioners do *not* contend that Respondents are liable because they failed to provide their son with a safe place to work. Rather, Petitioners contend that a government employee — through affirmative and reckless acts (later described as criminal and was found to be both punishable and potentially lethal by government officials) violated their son's Fourteenth Amendment right not to be deprived of his life "without due process of law."[4]

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[4] For this reason as well, the court of appeals' rejection of Petitioner's state-created danger claims because of *Collins* is plain error. Although the Court has not yet explicitly adopted it, a majority of circuits have implemented some variation of the state-created danger theory. *See Pena v. DePrisco*, 432 F.3d 98, 107-10 (2d Cir. 2005); *Sanford v. Stiles*, 456 F.3d 298, 304 (3d Cir. 2006) ("[L]iability may attach where the state acts to *create* or *enhance* a danger that deprives the Petitioner of his or her Fourteenth Amendment right to substantive due process." (emphasis in original)); *Rivas v. City of Passaic*, 365 F.3d 181, 194, 197 (3d Cir. 2004); *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1066 (6th Cir. 1998); *Reed v. Gardner*, 986 F.2d 1122, 1126 (7th Cir. 1993); *Forrester v. Bass*, 397 F.3d 1047, 1057-59 (8th Cir. 2005); *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1061 (9th Cir. 2006); *Uhlrig v. Harder*, 64 F.3d 567, 572 (10th Cir. 1995); *see also Wyke v. Polk County Sch. Bd.*, 129 F.3d 560, 567 (11th Cir. 1997) ("The language of *DeShaney* does indeed 'leave room' for state liability where the state creates a danger or renders an individual more vulnerable to it."). *But see Velez-Diaz v. Vega-Irizarry*, 421 F.3d 71, 80 (1st Cir. 2005) ("This court has, to date, discussed the state created danger theory, but never found it

(Cont'd)

Collins, therefore, does not bar the application of the deliberate indifference standard here and the court of appeals was wrong to conclude otherwise.

II. *CERTIORARI* SHOULD BE GRANTED BECAUSE THE CIRCUITS ARE SPLIT.

The cases discussed below evince a split between the circuits (Third, Sixth and Tenth) that recognize deliberate indifference claims without a showing of special circumstances (*i.e.*, custody or state-created danger) *versus* those circuits (D.C. and Fourth) that permit deliberate indifference claims only where special circumstances are involved.

Third Circuit

The split among the circuits, and the differing results it fosters, is made pellucidly clear by the recent decision in *Marvel v. Delaware County*, 2008 WL 1700536 (E.D. Pa. 2008). *Marvel*, in every important way, is this case. There, however, a third circuit district court saw an actionable due process claim. *Id.* at *1, 3.

David Marvel was issued a citation for having an open container of alcohol in a state park. *Id.* at *1. In lieu of facing prosecution, Marvel elected pretrial

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(Cont'd)

actionable on the facts alleged.") (internal quotation marks and citation omitted); *Pinder v. Johnson*, 54 F.3d 1169, 1176 (4th Cir. 1995); *Rios v. City of Del Rio*, 444 F.3d 417, 422 (5th Cir. 2006) (noting that "this court has frequently spoken of the 'state-created danger' theory," but has never adopted it).

diversion to Delaware County's Accelerated Rehabilitative Disposition Program. Marvel was required to assist contractors in constructing a firing range at the county's Emergency Training Center. *Id.*

On July 31, 2006, the National Weather Service issued an Excessive Heat Warning that was to remain in effect for four days. *Id.* Nevertheless, Marvel worked strenuously outdoors from 7:00 a.m. until 4:00 p.m. *Id.* The following day, he again reported for work at 7:00 a.m. and helped in the building of a two-story scaffold. *Id.* He and his fellow workers were given insufficient water to sustain themselves. *Id. at* *2.

At 11:00 a.m., as he unloaded cinder blocks in the sweltering heat, Marvel became ill and collapsed with labored breathing and perspiration. *Id.* Eventually, an ambulance was called which took Marvel to the hospital. There, Marvel was pronounced dead of cardiac arrest. *Id.* He had no preexisting heart condition.

Both Waybright and Marvel were endangered by excessive heat. Both were endangered by insufficient water (in fact, Mr. Waybright was given no water at all). Both were placed in a situation in which they could not obtain water on their own. Both men were imperiled by state actors (and not third parties) who not only foresaw the danger of harm their actions presented but were indifferent to the effect those actions would have. Both men died of heat-induced cardiac arrest. Both men had no prior history of heart disease.

The key facts involved in *Marvel* and this case are the same.[5] The disposition by the Fourth Circuit and the Pennsylvania district court (applying Third Circuit cases), however, are polar opposites. The *Marvel* court concluded that the state action alleged there shocked the conscience because "Defendants not only foresaw the danger of harm their actions presented, but were deliberately indifferent to the effect those actions would have on Marvel [and because] nothing in the alleged facts evidences a 'hyper-pressurized situation.'" *Id.* at *5. Thus, the law of the Third and Fourth Circuits, applied to virtually identical facts, yields wholly opposite results that cannot thereby be reconciled. This alone warrants the grant of *certiorari*.

Listed below are the other Third Circuit cases and those of the Sixth and Tenth Circuits which likewise evince the split between those circuits and the D.C. and Fourth Circuits.

Rivas v. City of Passaic, 365 F.3d 181, 203-04 (3d Cir. 2004) ("In other words, the plaintiffs here must demonstrate that the EMTs 'consciously disregarded, not just a substantial risk, but a *great risk* that serious harm would result' from their conduct." (emphasis in original)).

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[5] The case was before the *Marvel* court on a Fed. R. Civ. P. 12(b)(6) motion to dismiss which required the court to accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief.

Ziccardi v. City of Philadelphia, 288 F.3d 57, 66 (3d Cir. 2002) (Alito, J.) (Formulating the following standard for circumstances where no instantaneous decision is necessary, but where the state actor also does not have the luxury of proceeding in a deliberate fashion: A Petitioner must show that the "defendant[] consciously disregarded, not just a substantial risk, but a *great* risk that serious harm would result." (emphasis in original)).

Miller v. City of Philadelphia, 174 F.3d 368, 375-76 (3d Cir. 1999) (utilizing a standard part way between intent to harm and deliberate indifference).

Sixth Circuit

Estate of Owensby v. City of Cincinnati, 414 F.3d 596, 603 (6th Cir. 2005), *cert. denied*, 547 U.S. 1129 (2006) ("Under these circumstances, there is no question that the officers had 'time to fully consider the potential consequences of their conduct.' Accordingly, the district court properly applied the traditional deliberate indifference standard." (internal citation omitted)).

Ewolski v. City of Brunswick, 287 F.3d 492, 511 (6th Cir. 2002) ("The time for deliberation available to [police] in deciding how to respond to [a two-day police standoff] distinguishes this case from those in which actual malice and an intent to harm [is] required[,]" such as *Lewis*).

Tenth Circuit

Radecki v. Barela, 146 F.3d 1227, 1231 (10th Cir. 1998) (holding that under *Lewis*, "in assessing the constitutionality of law enforcement actions, we now distinguish between emergency action and actions taken after opportunity for reflection").

CONCLUSION

This is a case that provides an ideal circumstance for the Court to resolve the conflict between the circuits. For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED JUNE 2, 2008

UNITED STATES COURT OF APPEALS FOURTH CIRCUIT

No. 07-1289

James WAYBRIGHT, as personal representative and co-executor of the estate of Andrew Waybright (deceased); Shirley Waybright, individually and as personal representative and co-executor of the estate of Andrew Waybright (deceased),

Plaintiffs-Appellants,

v.

FREDERICK COUNTY, MARYLAND, Department of Fire & Rescue Services; Walter F. Murray, in his official capacity as Fire Emergency Director for the Frederick County Department of Fire & Rescue Services; Jeffrey Coombe, in his official capacity as training officer for the Frederick County Department of Fire & Rescue Services; Stanley Poole, in his official capacity as a member of the Frederick County Department of Fire & Rescue Services; Frederick County; Jan H. Gardner, in her individual and official capacity as a member of the Frederick County Board of Commissioners; David Gray, in his individual and official capacity as a member of the Frederick County Board of Commissioners; Andrew Marsh, in his individual and official capacity as an officer in the Frederick County Department of Fire & Rescue

Services; Mark McNeal, in his individual and official capacity as an officer in the Frederick County Department of Fire & Rescue Services; Terre Rhoderick, in his individual and official capacity as a member of the Frederick County Board of Commissioners; John L. Thompson, JR., in his individual and official capacity as a member of the Frederick County Board of Commissioners; Richard Welden, in his individual and official capacity as a member of the Frederick County Board of Commissioners,

Defendants-Appellees.

Argued: March 21, 2008.

Decided: June 2, 2008.

Before *WILKINSON*, *KING*, and *GREGORY*, Circuit Judges.

Affirmed in part, reversed in part, and remanded by published opinion. Judge *WILKINSON* wrote the opinion, in which Judge *KING* and Judge *GREGORY* joined.

Appendix A

OPINION

WILKINSON, Circuit Judge:

Andrew Waybright died by accident while training to join the Frederick County Fire Department in Maryland. His parents brought suit on state constitutional and tort law grounds-but also, with the same conduct in view, under 42 U.S.C. § 1983 and substantive due process. The § 1983 claims overreach; nothing defendants did rises to the level of a due process violation, and accidents in the main are a matter of state law. As to the state constitutional and tort law claims, we remand them to state court, where this case began and where it still belongs.

I.

A little before seven on the morning of July 3, 2002, new recruits for the Frederick County Fire Department assembled for outdoor physical training. A firefighter named Jeffrey Coombe was supervising, and he drove the recruits hard. He had told the group that he didn't like quitters and didn't like to hear "I can't." That morning, for an hour, with temperatures rising to eighty-four degrees and a heat index rising to ninety-six, recruits ran 4.3 miles, did squats, pushups, and other calisthenics, and ran wind sprints. Coombe did not bring water, or communications, transportation, or first-aid equipment. Many of the recruits struggled during the session and some experienced disorientation and pronounced exhaustion. One told Coombe that he was dizzy, and Coombe told him to rest.

Appendix A

A 23-year-old recruit named Andrew Waybright started looking sick and pale during the workout. Another recruit asked if Waybright wanted to say something to Coombe, but Waybright said no. Just before 8:10 A.M., as the session was concluding and everyone was heading back to the Training Center, Waybright collapsed in the grass. He tried to crawl back to the Training Center, saying "I want to finish with my class," and was able to get up briefly. But his legs were shaky and Coombe told him to rest where he was.

As Waybright lay there, two bystanders came by and offered to call 911, but another firefighter, Eckhardt (who was also an emergency medical technician), said that Waybright was "just played out," no need to call. Coombe stayed with Waybright briefly, but did not administer first aid. Before leaving, Coombe assigned Eckhardt to watch over Waybright. At the Training Center, Coombe told a second firefighter, Grossnickle, to get a pickup truck to pick Waybright up.

While Eckhardt waited with him, Waybright lost consciousness. Eckhardt had no phone or radio, but when Grossnickle arrived in the truck, Eckhardt told him to call 911. Grossnickle returned to the Training Center, told another firefighter to call 911, and brought a paramedic back to the scene. He returned to the Training Center to look for medical equipment, which he couldn't find.

At about 8:15, Waybright went into *cardiac arrest.* The paramedic administered CPR, and soon thereafter

an ambulance arrived and took Waybright to the emergency room-where, at 9:22, he died. An autopsy revealed that he had no preexisting conditions and died of *hyperthermia* (*heat stroke*).

A Frederick County Board of Inquiry was impaneled and, after considerable investigation, issued a report in January 2003. With respect to Coombe, the report found that he failed to bring water to the training session (contrary to protocol), overlooked the recruits' distress during the session, and failed to recognize the emergency situation that occurred when Waybright collapsed. With respect to Frederick County's recruiting school, the report found that its staff was overloaded and undertrained (Coombe, for example, had no certification in physical fitness), and that the school simply could not be run safely without substantial reform. It also found that at least one supervisor knew about these problems to some extent. In response to the incident and report, the recruiting school was shut down for several years and training outsourced to other jurisdictions.

In March 2004, Andrew Waybright's parents filed a tort suit in state court against Jeffrey Coombe, various co-workers in the Frederick County Fire Department, and the Department itself. The complaint alleged wrongful death, loss of solatium, and survival, all premised on negligence. At a hearing in mid-November, the court dismissed the survival claim.

Before the state court could rule on the remainder of the case, plaintiffs filed an amended complaint adding new defendants and new causes of action, some of which were federal. Defendants, invoking federal question jurisdiction, removed to federal district court-where over the next two-and-a-half years, the case ballooned, swelling in complexity to such an extent that the second amended complaint, at seventy-nine pages, was almost six times the original state complaint's length, and the district court needed a chart to keep track of the claims and defendants. See *Waybright v. Frederick County Md. Dep't of Fire & Rescue Servs.*, 475 F.Supp.2d 542, 548 (D.Md.2007). When all was said and done, plaintiffs had lodged three types of claims against four types of defendants.

First was a 42 U.S.C. § 1983 (2000) claim, premised on Waybright's substantive due process right to life and directed against Coombe, various supervisors at the Fire Department, various members of the Frederick County Board of Commissioners, and Frederick County itself. With respect to Coombe, the claim stemmed from his conduct on that July 3d morning; as to the others, it stemmed from their supervisory role in creating the conditions that allegedly led to Waybright's death. See *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690-91, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978); *Carter v. Morris*, 164 F.3d 215, 220-21 (4th Cir.1999). Second was a state constitutional claim, based on Article 24 of the Maryland Declaration of Rights ("no man ought to be . . . deprived of his life, liberty or property, but by . . . the Law of the land"), and directed against Coombe, the supervisors

at the Fire Department, and the commissioners of the Board. Third were the original state tort claims, based on wrongful death, loss of solatium, and (despite the state court's ruling) survival, and directed against Coombe, the supervisors at the Department, and Frederick County.

Defendants moved for summary judgment, and, in March 2007, the district court granted it with respect to plaintiffs' federal and state constitutional claims, but remanded the tort claims to the Circuit Court for Frederick County. *Waybright*, 475 F.Supp.2d 542. First, the district court rejected plaintiffs' § 1983 due process claim, holding that Coombe's conduct was not egregious enough to "shock the conscience" as a constitutional matter because the harm Coombe did was not intentional. See *County of Sacramento v. Lewis*, 523 U.S. 833, 846-49, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). The district court reasoned, second, that the federal due process analysis should control the state Article 24 analysis, citing the Maryland Court of Appeals for the proposition that the two are "in pari materia, such that the interpretations of the Due Process Clause of the Fourteenth Amendment provided by the United States Supreme Court serve as persuasive authority for Article 24." *Pickett v. Sears, Roebuck & Co.*, 365 Md. 67, 775 A.2d 1218, 1224 (2001). Finally, as to plaintiffs' state tort claims, the district court declined to exercise supplemental jurisdiction and remanded them to state court. Plaintiffs timely appealed.

Appendix A

II.

The § 1983 claim against Jeffrey Coombe is the gateway to all the other § 1983 claims, for supervisors and municipalities cannot be liable under § 1983 without some predicate "constitutional injury at the hands of the individual [state] officer," at least in suits for damages. *City of Los Angeles v. Heller*, 475 U.S. 796, 799, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986); see also *Grayson v. Peed*, 195 F.3d 692, 696 (4th Cir.1999). Here, the individual constitutional wrong alleged is that Coombe deprived Way-bright "of his right to life under the Fourteenth Amendment to the U.S. Constitution"- a substantive due process claim. Second Am. Compl. ¶ 114. If this allegation survives scrutiny, we go on to the others; if not, the federal side of this case comes to a close.

A.

The Fourteenth Amendment's Due Process Clause protects a set of interests-life, liberty, and property-that are also protected by state tort law. Together with § 1983, then, there is some risk of the Clause supplanting state tort law in almost any suit alleging that a local official has caused harm. In case after case, the Supreme Court has rejected this prospect and spurned any approach to the Fourteenth Amendment that would make it "a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Paul v. Davis*, 424 U.S. 693, 701, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976). See also *County of*

Sacramento v. Lewis, 523 U.S. 833, 848, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) ("[T]he due process guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm."); *Collins v. City of Harker Heights*, 503 U.S. 115, 128-29, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992) ("[W]e have previously rejected claims that the Due Process Clause should be interpreted to impose federal duties that are analogous to those traditionally imposed by state tort law."); *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 202, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989) ("[T]he Due Process Clause of the Fourteenth Amendment . . . does not transform every tort committed by a state actor into a constitutional violation."); *Daniels v. Williams*, 474 U.S. 327, 332, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986) ("Our Constitution . . . does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society."); *Baker v. McCollan*, 443 U.S. 137, 146, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979) ("Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law.").

Two principles stand out in these cases. The first involves a certain sense of constitutional magnitude-a sense that, as due process at the core combats "arbitrary action" of government, *County of Sacramento*, 523 U.S. at 845, 118 S.Ct. 1708 (emphasis added), applying the Clause to the ordinary run of governmental neglect, inaction, and bad policy would diminish it. Thus we find the Court remarking that "only the most egregious

official conduct can be said to be arbitrary in the constitutional sense,"*id.* at 846, 118 S.Ct. 1708 (quotation omitted); that the Constitution "deals with the large concerns of the governors and the governed,"*Daniels*, 474 U.S. at 332, 106 S.Ct. 662; that courts should exercise "judicial self-restraint" and "utmost care" in novel substantive due process cases, *Collins*, 503 U.S. at 125, 112 S.Ct. 1061; and that the Clause "was intended to prevent government from abusing its power, or employing it as an instrument of oppression,"*DeShaney*, 489 U.S. at 196, 109 S.Ct. 998 (quotation omitted), and it would not do to "trivialize" it, *Daniels*, 474 U.S. at 332, 106 S.Ct. 662. Repeatedly, the Court quotes Chief Justice Marshall's great admonishment: "[W]e must never forget, that it is a constitution we are expounding." *McCulloch v. Maryland*, 4 Wheat. 316, 407, 4 L.Ed. 579 (1819) (emphasis in original), quoted in *County of Sacramento*, 523 U.S. at 846, 118 S.Ct. 1708; *Daniels*, 474 U.S. at 332, 106 S.Ct. 662; and *Paul*, 424 U.S. at 732, 96 S.Ct. 1155 (Brennan, J., dissenting).

Second is concern for the authority of state governments over areas traditionally assigned to state law-and with that, disquiet at the potentially staggering practical consequences of empowering federal judges to oversee everything from pillows left on prison stairs *(Daniels)* to sewer maintenance *(Collins)* with the inflexible instrument of constitutional law. Thus *Collins* states that decisions about how to allocate resources in state government "involve a host of policy choices that must be made by locally elected representatives, rather

than by federal judges interpreting the basic charter of Government for the entire country." 503 U.S. at 129, 112 S.Ct. 1061. And *Paul v. Davis*, "paus[ing] to consider the result" should § 1983 be interpreted to "transmute[ ]" ordinary torts against the government into Fourteenth Amendment claims, points out that almost anyone wronged by local authority would obtain a constitutional claim under such a view-a result that "would come as a great surprise to those who drafted and shepherded the adoption of that Amendment." 424 U.S. at 698-99, 96 S.Ct. 1155.

With these principles in mind, the Supreme Court has, for half a century now, marked out executive conduct wrong enough to register on a due process scale as conduct that "shocks the conscience," and nothing less. *County of Sacramento*, 523 U.S. at 846, 118 S.Ct. 1708 (quoting *Rochin v. California*, 342 U.S. 165, 172, 72 S.Ct. 205, 96 L.Ed. 183 (1952)). The shocks-the-conscience test turns on degree of fault. For a due process challenge to executive action to succeed, the general rule is that the action must have been "intended to injure in some way unjustifiable by any government interest." *County of Sacramento*, 523 U.S. at 849, 118 S.Ct. 1708. As to "negligently inflicted harm," it is "categorically beneath the threshold of constitutional due process." *Id.* And as to "culpability falling within the middle range, following from something more than negligence but less than intentional conduct," the Court has allowed that it may have constitutional implications, but only in special circumstances. *Id.* (quotation omitted). As to what those special circumstances are, the Court has issued no

general rule except that judges should proceed with "self-restraint" and "utmost care," *Collins*, 503 U.S. at 125, 112 S.Ct. 1061, and make "an exact analysis" of the circumstances presented "before any abuse of power is condemned as conscience shocking," *County of Sacramento*, 523 U.S. at 850, 118 S.Ct. 1708.

What this body of law on the whole makes clear is that, where a claim sounds both in state tort law and substantive due process, state tort law is the rule and due process the distinct exception. In other words, the Supreme Court has established a strong presumption that § 1983 due process claims which overlap state tort law should be rejected and the case, if diversity is lacking, sent to state court. The presumption is rebuttable: It can be overcome by showing governmental conduct so "arbitrary" and "egregious" that it "shocks the conscience," usually because a state actor intended harm without justification. *County of Sacramento*, 523 U.S. at 845-46, 849, 118 S.Ct. 1708. But the presumption should be vigorously applied, for without it, a problem arises that we see in the present case and never want to see in law: basic difficulty and extensive litigation over the forum in which a case belongs-a threshold question that tells plaintiffs and defendants nothing about the merits of the case and delays resolution for all.

Plaintiffs' § 1983 due process claim overlaps state tort law; there is thus a presumption against it. The most likely path for overcoming the presumption is closed, for under no construction of events could Coombe be said to have intended Waybright's death. And to the

extent Coombe was negligent, the claim is not a constitutional one and the presumption stands. Thus plaintiffs' only option is to argue, against a presumption to the contrary, that this case presents one of those special circumstances in which culpability in the middle range-here, deliberate indifference-should shock the conscience to such an extent that a federal action lies.

B.

Plaintiffs' first and major argument for recognizing a federal substantive due process claim is that Coombe, in their view, had time before Waybright's collapse to deliberate about the dangers awaiting recruits. Coombe knew how dangerous it was to exercise outside in the heat without adequate hydration; he had given a PowerPoint presentation on the subject just the day before the fatal run. And although one might disagree as to whether Coombe had time to deliberate after Waybright collapsed, plaintiffs argue, he certainly had time beforehand to make an unrushed decision about the need to have water on hand. According to plaintiffs, it was this time to deliberate that transmuted what might otherwise be ordinary negligence into a form of deliberate indifference cognizable under the U.S. Constitution.

The support for this argument comes from the Sixth Circuit's remarks in *Estate of Owensby v. City of Cincinnati* that "[t]he determining factor" when deciding whether deliberate indifference shocks the conscience should be "whether the circumstances

allowed the state actors time to fully consider the potential consequences of their conduct." 414 F.3d 596, 602 (6th Cir.2005) (quotation omitted). But the case law as a whole is against a general rule that time to deliberate transforms negligent error into constitutionally shocking conduct. The D.C. Circuit has rejected the rule, holding that "[t]he opportunity for deliberation alone is not sufficient to apply" a lower bar to substantive due process claims. *Fraternal Order of Police Dep't of Corr. Labor Comm. v. Williams*, 375 F.3d 1141, 1146 (D.C.Cir.2004). And the Supreme Court, we think, has done the same. In holding that due process does not require governmental employers to provide a safe workplace, but that state tort law may, see *Collins v. City of Harker Heights*, 503 U.S. 115, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992), the Court necessarily rejected the time to deliberate theory-for employers most often have time to deliberate about workplace conditions. The Court has also held that there is no deliberate indifference without actual knowledge of a danger, see *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994)—and of course one can have time to deliberate about danger without having actual knowledge of it.

The time to deliberate theory is also difficult to apply. What part of the challenged conduct matters? Does the opportunity to deliberate begin months or weeks before an accident, the night before, or at the time events unfolded? This question would emerge in many cases besides Waybright's because longstanding conditions often lead to rapidly unfolding harm. Also,

when has one had enough time to deliberate? What kind of prior notice of potential danger causes the deliberative duty to kick in? These and other questions have real litigious potential. Indeed, they threaten more cases like the present one, where confusion over what belongs in state and what in federal court leads to delay for plaintiffs in getting relief and uncertainty for defendants in finding out if liability attaches.

Plaintiffs' second argument is that a federal question arises because Coombe and Waybright were in what the Supreme Court has called "a special relationship." See *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 197-200, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989). It is true that, where the state is in a special relationship to a private individual, it acquires a duty to act on that individual's behalf and its failures to act are measured on a deliberate indifference standard; that is why a conscious disregard of the rights of prisoners, pretrial detainees, and committed mental patients have traditionally been examined for deliberate indifference. See *Patten v. Nichols*, 274 F.3d 829, 836-37 (4th Cir.2001). The problem is that "special relationship" is a term of art that does not apply to Coombe and Waybright.

As *DeShaney* indicates and our case law specifies, a "special relationship" is all but synonymous with a custodial relationship. See *DeShaney*, 489 U.S. at 199-200, 109 S.Ct. 998 ("[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to

assume some responsibility for his safety and general well-being."); *Pinder v. Johnson*, 54 F.3d 1169, 1175 (4th Cir.1995) (en banc) ("This Court has consistently read *DeShaney* to require a custodial context before any affirmative duty can arise under the Due Process Clause."). The idea of a custodial relationship is a circumscribed one, grounded in the rationale *DeShaney* gives for it: "[W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs . . . it transgresses the substantive limits on state action . . . ." 489 U.S. at 200, 109 S.Ct. 998. Thus "[s]ome sort of confinement" is needed to render a relationship custodial, such as "incarceration, institutionalization, or the like." *Pinder*, 54 F.3d at 1175. Coombe did not confine Waybright in this sense. Waybright was free to walk away from the exercise session and the job. See *Collins*, 503 U.S. at 128, 112 S.Ct. 1061 (holding that a city employee in a dangerous workplace is not in a custodial relationship because he has "voluntarily accepted[ ] an offer of employment").

Plaintiffs' third argument is that a substantive due process claim arises because Coombe created the danger Waybright faced. As we stated in *Pinder*, "[w]hen the state itself creates the dangerous situation that resulted in a victim's injury, the absence of a custodial relationship may not be dispositive." 54 F.3d at 1177. Here, plaintiffs argue, the training session should qualify as a state-created danger because a state actor, Coombe, "used his authority to create an opportunity for danger that

otherwise would not have existed," and thereby knowingly put Waybright in harm's way. *Rivas v. City of Passaic*, 365 F.3d 181, 194 (3d Cir.2004).

To apply the state-created danger theory in this context, however, would run afoul of the Supreme Court's unanimous decision in *Collins*, 503 U.S. 115, 112 S.Ct. 1061, 117 L.Ed.2d 261, which held that due process does not impose a duty on municipalities to provide their employees with a safe workplace or warn them against risks of harm (though state tort law may). The case is right on point, for plaintiffs' state-created danger claim, in essence, is that Coombe created an unsafe workplace that caused a prospective employee harm. And while we recognize that *Collins* involved a municipal rather than an individual defendant, the case speaks decisively to the situation here.

The underlying concern in *Collins* was that constitutional law would push state tort law aside whenever a state or local government acted as employer, thus placing "a host of policy choices that must be made by locally elected representatives" with "federal judges interpreting the basic charter of Government for the entire country." *Id.* at 129, 112 S.Ct. 1061. The state-created danger theory in the present case portends just such a federal displacement of state authority over state activities, for it would potentially set up a federal question whenever an accident happens during activities sponsored by the state. The practical consequences would be immense; by finding a state-created danger here, we might well inject federal authority into public

school playground incidents, football (or even ballet) practice sessions, and class field trips, not to mention training sessions for government jobs that require some degree of physical fitness. Sometimes practice is demanding because games are demanding, and training is demanding because jobs are demanding, and how best to conduct these sessions can rarely be the focus of a constitutional claim. To transform ordinary mishaps into constitutional questions would not only bring them into federal court more frequently. Because Congress and the federal judiciary often set the ground rules for those claims in terms of scope of immunity, availability of punitive damages, award of attorneys' fees, and the like, the displacement of state law with federal policies would be difficult to overstate.

C.

Plaintiffs' attempt to create a federal claim is thus all but at a close. The facts reveal a terribly sad occurrence, but not conduct that meets the constitutional threshold.

The Supreme Court has held that "only the most egregious official conduct" can shock the conscience. *County of Sacramento v. Lewis*, 523 U.S. 833, 846, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). Successful claims in this area typically feature quite extreme governmental wrongdoing. See, e.g., *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952) (pumping a suspect's stomach to look for drugs). But here, under no plausible reading of the facts did

Coombe even know that Waybright was in serious, let alone mortal, danger. When Waybright started to feel ill during the workout, he did not tell Coombe. (Another recruit, who did tell Coombe when he felt dizzy, was given a break.) When Waybright collapsed, he did not immediately lose consciousness, and indeed "got back up under his own power" and "kept saying, 'I want to finish with my class,' " according to the Board of Inquiry report. No one at that time seems to have recognized how serious Waybright's situation was; hence the remark by another firefighter, when two passers-by offered to call 911, that there was no need to call because Waybright was "just played out." In addition, Coombe did not ignore or disregard Waybright's distress when he learned of it. After Waybright stood up in an effort to continue, it was Coombe who told him to rest instead. Coombe also assigned a second firefighter (one with medical training) to look after Waybright, and told a third firefighter to get a vehicle to pick Waybright up. This conduct is a far cry from shocking the conscience. It was, rather, as the Board of Inquiry concluded, an under-reaction—that is, a misjudgment. Whether it was a negligent misjudgment is not for us to say, but misjudgments such as these are "categorically beneath the threshold of constitutional due process." *County of Sacramento*, 523 U.S. at 849, 118 S.Ct. 1708.

Of course, one wishes dearly that Coombe had acted differently. "Tragic circumstances," as we have remarked, "only sharpen our hindsight. . . ." *Pinder v. Johnson*, 54 F.3d 1169, 1178 (4th Cir.1995). In that spirit, plaintiffs urge us to turn our focus away from Coombe's

conduct after Waybright collapsed and toward Coombe's initial decision to go on the run without water or other supplies. But one way of improperly using hindsight is to reason backwards from an accident to the decisions that set it into motion. One must instead take the situation ex ante, from the perspective of the state official, and ask whether his or her decisions when he or she made them were of a magnitude to shock the conscience. Instruction that seems overzealous, and precautions that seem insufficient, do not reach that level.

We therefore affirm the district court's denial of plaintiffs' § 1983 claim against Coombe. And with the claim against Coombe gone, so go the § 1983 claims against everyone else. See *City of Los Angeles v. Heller*, 475 U.S. 796, 799, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986); *Grayson v. Peed*, 195 F.3d 692, 696 (4th Cir.1999).

III.

The federal side of this case is at an end. What remain, however, are plaintiffs' state constitutional claims under Article 24 of the Maryland Declaration of Rights and the state tort claims with which this case began. The district court dismissed the constitutional claims because, according to *Pickett v. Sears, Roebuck & Co.*, 365 Md. 67, 775 A.2d 1218, 1224 (2001), Article 24 and the federal Due Process Clause are to be interpreted "in pari materia." But the court declined to exercise supplemental jurisdiction over the tort claims, and remanded them, because they "involve novel and

complex arguments regarding the interplay between" various state statutes, as well as the "impact of those rulings" already made in this case in the Circuit Court for Frederick County. *Waybright v. Frederick County Md. Dep't of Fire & Rescue Servs.*, 475 F.Supp.2d 542, 556-57 (D.Md.2007).

We agree with the district court's decision as to the tort claims, but it erred in passing on the merits of plaintiffs' Article 24 claim. Since *Pickett* was decided, *Dua v. Comcast Cable of Md., Inc.*, 370 Md. 604, 805 A.2d 1061, 1072 (2002), stated that federal decisions about the Due Process Clause "are no more than persuasive authorities" when it comes to applying Article 24, and *Koshko v. Haining*, 398 Md. 404, 921 A.2d 171, 194 (2007), noted that "the extent of protection bestowed upon liberty interests recognized as being enshrined within the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution does not dictate necessarily the full complement of safeguards extended to liberty interests available under the Maryland due process analog found in Article 24."

We decline to make a close analysis of the issue, however, because there is an even more important reason to decline supplemental jurisdiction here. The upshot of our analysis is that this case is basically a state case gone awry. With all its federal questions gone, there may be the authority to keep it in federal court under 28 U.S.C. §§ 1367(a) and 1441(c) (2000), but there is no good reason to do so. Plaintiffs deserve a day in court on all their state law claims, and the better path is to send their case back to state court whole.

IV.

This case started life as a perfectly sensible state tort suit. Then, a little repackaging turned its state tort claims into federal due process claims under § 1983 and created a constitutional case—a rather swollen one at that—which, after three-and-a-half years of additional litigation, is going right back to the court and basically the claims with which it started. In part, this case is sad because of the tragedy that set it into motion. But it is sad also because of the long legal detour that stilled all progress on the merits while federal courts necessarily rebuffed the prospect of federal law taking over the traditional office of the states. Plaintiffs had every right to amend their state court complaint; defendants had every right to remove on the basis of a federal question; and plaintiffs had every right to appeal the dismissal of their federal claims. But wisdom may reside in recognizing that less is sometimes more and that zealous advocacy need not always part company with forbearance and restraint. Recognizing this case for what it was and what it remains, we affirm the dismissal of plaintiffs' federal claims and direct that all state claims be remanded to state court.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND DATED MARCH 1, 2007

UNITED STATES DISTRICT COURT
D. MARYLAND

Civil Action No. RDB 05-55

James and Shirley WAYBRIGHT, as personal representatives and co-executors of the estate of Andrew Waybright, et al.,

Plaintiffs,

v.

FREDERICK COUNTY MARYLAND DEPARTMENT OF FIRE & RESCUE SERVICES, et al.,

Defendants.

March 1, 2007

MEMORANDUM OPINION

RICHARD D. BENNETT, District Judge.

This action arises out of a Complaint originally filed in the Circuit Court for Frederick County, Maryland. The estate of Andrew Waybright and James and Shirley Waybright, as personal representatives and co-executors of the estate of Andrew Waybright (collectively,

"Plaintiffs") brought this action against Jeffrey Coombe, Walter Murray, Stanley Poole, Mark McNeal, Andrew Marsh, David Gray, John L. Thompson, Jr., Richard Welden, Jan H. Gardner, Terre R. Rhoderick, and the Frederick County, Maryland Department of Fire and Rescue Services, an agency of Frederick County, Maryland (collectively, "Defendants").[1] The case was removed to this Court based on federal question jurisdiction arising from allegations of violations of the United States Constitution. The Complaint seeks damages in connection with the tragic and untimely death of firefighter recruit Andrew Waybright on July 3, 2002. Mr. Waybright died from *heat exhaustion* suffered in connection with physical training exercises administered by Defendant Jeffrey Coombe of the Frederick County, Maryland Department of Fire and Rescue Services. Currently pending before this Court are two Motions for Summary Judgment, one filed by Defendant Jeffrey Coombe and the other filed by the remaining Defendants. This Court has jurisdiction under 28 U.S.C. § 1331. The issues have been fully briefed and a hearing was conducted on February 17, 2007. For the reasons that follow, Defendants' Motions for Summary Judgment are GRANTED-IN-PART and

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1. Defendants fall into three categories: (1) individuals who worked for the Frederick County, Maryland Department of Fire and Rescue Services, i.e., Jeffrey Coombe, Walter Murray, Stanley Poole, Mark McNeal, and Andrew Marsh; (2) members of the Board of Commissioners for Frederick County, Maryland, i.e., Commissioners David Gray, John L. Thompson, Jr., Richard Welden, Jan H. Gardner, and Terre R. Rhoderick; and (3) the municipal defendant, Frederick County, Maryland.

DENIED-IN-PART. As result, judgment will be entered in favor of Defendants and against Plaintiffs with respect to the Plaintiffs' federal and state constitutional claims under 42 U.S.C. § 1983 and Article 24 of the Maryland Declaration of Rights. Plaintiffs' residual claims based on Maryland tort law, however, will be REMANDED to the Circuit Court for Frederick County, Maryland.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This Court reviews the facts of this case in the light most favorable to the party opposing the motion. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

On July 3, 2002, at 6:30 a.m., 23 year-old firefighter recruit Andrew Waybright reported for a physical fitness training session at the Frederick County Public Safety Training Center (the "Training Center"). At 7:00 a.m., the one-hour training session began. It involved a short walk, a 3-4 mile run, calisthenics, uphill wind sprints, and a jog. Toward the end of the exercises, Waybright looked "sick, dehydrated, pale, and in a state of exhaustion and pain." (Pl.'s Opp. Mots. Summ. J. Ex. 1 (the "Board of Inquiry Report") p. 20.) At the time, the temperature was approximately 84.2 degrees Fahrenheit and the humidity was 84 percent, resulting in a heat index of 96.

Just before 8:10 a.m., Waybright collapsed. Two civilians saw Waybright lying facedown in the grass and

offered to call 911. A firefighter attending to Waybright, however, told them that assistance was not necessary and that Waybright was "just played out." (Board of Inquiry Report p. 28.) At some point, the paramedics were called and arrived on the scene. At 8:16 a.m., a paramedic reported that Waybright had gone into *cardiac arrest*. (*Id.* at p. 8.) At 8:32 a.m., Waybright was transported to the emergency room of Frederick Memorial Hospital. At 9:22 a.m., a doctor pronounced Andrew Waybright dead. His core body temperature was 107.4 degrees Fahrenheit. An autopsy identified *hyperthermia* as the cause of death and indicated that Waybright "had no preexisting conditions. . . ." (*Id.*)

Defendant Jeffrey Coombe was the physical training instructor for the session on July 3, 2002. It is undisputed that Coombe failed to recognize Waybright's deteriorating condition during the training exercise. After Waybright collapsed, Coombe stayed with Waybright for a short period of time. Without administering basic first aid, Coombe left Waybright to return to the Training Center and assigned a firefighter named Eckhardt to attend to Waybright. After arriving at the Training Center, Coombe asked another firefighter-Troy Grossnickle-to get a pick-up truck and help Waybright. After driving to Waybright in the pick-up truck, Grossnickle was advised by Eckhardt that "Waybright was unconscious and to call for an ambulance." (Board of Inquiry Report p. 21.) Grossnickle returned to the Training Center to get a "bag valve mask" and oxygen but could not find the equipment. (*Id.* at 8.) Grossnickle told yet another firefighter to call

911 and then drove to Waybright with some other firefighters. "As they arrived, FfR Waybright went into *cardiac arrest*, and the paramedic member of the [Combat Challenge Team] initiated CPR."

It is further undisputed that Coombe was not a trained physical fitness instructor. Coombe testified that he did "nothing" to become an instructor. (Coombe Dep., p. 23, l. 3.) At least one member of the Frederick County, Maryland Department of Fire and Rescue Services (the "Department") indicated that Coombe was not a "Level II" instructor, as required by the Maryland Fire and Rescue Institute. (Himes Dep. p. 29, ll. 3-15.) A Board of Inquiry was empaneled and its report noted that:

The Department placed the physical training instructor in a position with supervisory responsibilities for which he was not prepared. The instructor had not yet completed training to obtain certification in physical fitness.

(Board of Inquiry Report p. 17.) Coombe apparently completed a 36-hour shift just before beginning the recruit training class on July 3, 2002.

Although medical equipment was available at the Training Center, nobody retrieved it to help Waybright because the location of the equipment was unknown. As already noted, firefighter Grossnickle could not find a bag valve mask or oxygen when he went to the Training Center to get help for Waybright. As Coombe explained to the Board of Commissioners for Frederick

County, Maryland (the "Board"), "there was no [medical] equipment, no one knew where it was[, i]f it was there, it was locked up." (Pl.'s Opp. Mots. Summ. J. Ex. 3 p. 26.) There were also no radios or other communication devices with the recruit class during the training session on July 3, 2002. Coombe explained that this equipment was "under lock and key in the offices at the training center." (*Id.* at p. 24.)

Coombe's supervisors were aware of at least some of the above problems. For example, Defendant Stanley Poole acknowledges that training sessions such as the one that took place on July 3, 2002, should have been led by at least two instructors and involved a "gator" vehicle equipped with water, supplies, and communications equipment. (See Poole Dep. p. 142, ll. 4-12.) Other Defendants indicated that Poole had expressed concerns about the scheduling of instructors for Waybright's recruit class. (See, e.g., Marsh Dep. p. 137, ll. 8-17; see also Poole Dep. p. 147, ll. 14-16 (Acknowledging "the shortage of staff and the ability to have instructors available and those kind of things.").) The Board of Inquiry Report concluded that "[t]he Department lack[ed] the supervisory staff to operate a recruit school safely and effectively at the [Training Center] at this time." (Board of Inquiry Report p. 18.)

On March 9, 2004, Plaintiffs filed a Complaint in the Circuit Court for Frederick County, Maryland. (Paper No. 2.) This pleading asserted causes of action for wrongful death, loss of solatium, and survival under Maryland state law. (*Id.*) Each cause of action was

premised on allegations of negligence.[2] (*Id.*) On July 14, 2004, Defendants filed a Motion for Summary Judgment. (Paper No. 13; see also Paper No. 2 Ex. 1 p. 5.) On November 17, 2004, Judge Julie R. Stevenson Solt of the Circuit Court for Frederick County conducted a hearing. (*Id.* at p. 6.) During that hearing, Judge Solt granted Defendants' Motion for Summary Judgment with respect to the survival actions.[3] (Def.'s Mem. Supp. Summ. J. Ex. 16.)

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2. For example, with respect to Defendant Jeffrey Coombe, Plaintiffs alleged:

> That as a direct and proximate result of the negligence of Defendant, Jeffrey Coombe, the Plaintiffs jointly lost, and will continue to lose the society, companionship, comfort, protection, care, attention, advice, counsel, training, education, or guidance of the Decedent, Andrew Waybright.

(Id. at ¶ 34.)

3. The official transcript of the November 17 hearing provides:

> THE COURT: First of all I do note that the plaintiffs did agree as to the survival actions that summary judgment is appropriate. Those are clearly derivative actions [and] would have been barred. And it is, and, Counsel, I do trust you to correct me if I am wrong. I believe that applies to count one, count four, count seven, and count ten. Just take a second, because I want to make sure that is correct

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On December 10, 2004, Plaintiffs filed a First Amended Complaint. (Paper No. 26.) This pleading asserted new causes of action under 42 U.S.C. § 1983 and Article 24 of the Maryland Declaration of Rights. (*Id.*) Theses causes of action were premised on the contention that Waybright's substantive due process rights were violated. (*Id.*) On January 7, 2005, Defendants removed this action from the Circuit Court for Frederick County to this Court. (Paper No. 1 (notice of removal); see *id.* at ¶ 7 ("Because Plaintiffs' First Amended Complaint asserts claims arising under the Constitution and laws of the United States, Plaintiffs' action may be removed to this Court on the grounds of federal question jurisdiction. . . .").)

On January 4, 2006, this Court granted Plaintiffs' request for leave to file a Second Amended Complaint. (Paper No. 58.) This pleading reflected various amendments "to tailor the already existing civil rights claim to what was learned in discovery over the last several months." (Paper No. 57.) On May 1, 2006, Defendant Coombe filed his Motion for Summary

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. . .

PLAINTIFFS' COUNSEL: That's correct. . . .

THE COURT: Defendant's motion for summary judgment is granted on the survival actions: count one, count four, count seven, and count ten.

(Def.'s Mem. Supp. Summ. J. Ex. 16 pp. 40-41.)

Judgment. (Paper No. 68.) On the same day, the other Defendants filed their Motion for Summary Judgment. (Paper No. 69.) On August 21, 2006, Defendant Richard Himes was voluntarily dismissed. (Paper No. 90.) On September 5, 2006, John Does 1-20 were also dismissed. (Paper No. 94.) On February 17, 2007, this Court conducted a hearing on Defendants' Motions for Summary Judgment.

STANDARD OF REVIEW

Summary judgment is appropriate under Rule 56(c) of the Federal Rules of Civil Procedure when there is no genuine issue as to any material fact, and the moving party is plainly entitled to judgment in its favor as a matter of law. In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), the Supreme Court explained that, in considering a motion for summary judgment, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id. at* 248, 106 S.Ct. 2505. Thus, "the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the [nonmoving party] on the evidence presented." *Id.* at 252, 106 S.Ct. 2505.

In undertaking this inquiry, a court must view the facts and the reasonable inferences drawn therefrom

"in the light most favorable to the party opposing the motion,"*Matsushita,* 475 U.S. at 587, 106 S.Ct. 1348 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962)); see also *E.E.O.C. v. Navy Federal Credit Union,* 424 F.3d 397, 405 (4th Cir.2005). However, under certain circumstances the opponent must bring forth evidence upon which a reasonable fact finder could rely. *Celotex Corp. v. Catrett,* 477 U.S. 317, 324-25, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). "Once the movant has established the absence of any genuine issue of material fact, the opposing party has an obligation to present some type of evidence to the court demonstrating the existence of an issue of fact." *Pension Ben. Guar. Corp. v. Beverley,* 404 F.3d 243, 246-47 (4th Cir.2005) (citing *Pine Ridge Coal Co. v. Local 8377, UMW,* 187 F.3d 415, 422 (4th Cir.1999)).

DISCUSSION

I. The Complaint.

Plaintiffs' Second Amended Complaint contains 329 paragraphs and 47 counts. It is summarized in the following chart:

Defendant	Causes of Action (Count)
Walter Murray, officer of Frederick County, Maryland	Survival Action (1); Wrongful Survival Action (1); Wrongful Death (2); Loss of Solatium

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Departmentof Fire and Rescue Services (the "Department")	(3); 42 U.S.C. § 1983(27); Article 24 of the MD Decl. of Rights (28).
Jeffrey Coombe, member of the Department	Survival Action (4); Wrongful Death (5); Loss of Solatium (6); 42 U.S.C. § 1983(23); Article 24 of the MD Decl. of Rights (24).
Stanley Poole, member of the Department	Survival Action (7); Wrongful Death (8); Loss of Solatium (9); 42 U.S.C. § 1983(25); Article 24 of the MD Decl. of Rights (26).
Mark McNeal, officer of the Department	Survival Action (10); Wrongful Death (11); Loss of Solatium (12); 42 U.S.C. § 1983(31); Article 24 of the MD Decl. of Rights (32).
Andrew Marsh, officer of the Department	Survival Action (13); Wrongful Death (14); Loss of Solatium (15); 42 U.S.C. § 1983(29); Article 24 of the MD Decl. of Rights (30).
David Gray, member of the Board of Commissioners for Frederick County, Maryland (the "Board")	42 U.S.C. § 1983(35); Article 24 of the MD Decl. of Rights (36).

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John L. Thompson, Jr., member of the Board	42 U.S.C. § 1983(37); Article 24 of the MD Decl. of Rights (38).
Richard Welden, member of the Board	42 U.S.C. § 1983(39); Article 24 of the MD Decl. of Rights (40).
Jan H. Gardner, member of the Board	42 U.S.C. § 1983(41); Article 24 of the MD Decl. of Rights (42).
Terre R. Rhoderick, member of the Board	42 U.S.C. § 1983(43); Article 24 of the MD Decl. of Rights (44).
Frederick County	respondeat superior (22); 42 U.S.C. § 1983(47).

Count 46, which asserts claims of "supervisory liability" against the "supervisory officers as alleged herein," is not reflected in the above chart. (Sec.Am.Compl.¶ 317.) In addition, the causes of action against Defendants Richard Himes (Counts 16-18 and 33-34) and John Does 1-20 (Counts 19-21 and 45) are also not summarized above as those Defendants were dismissed. (See Paper Nos. 90 & 94.)

Plaintiffs contend that Andrew Waybright's substantive due process rights to "life, bodily integrity, medical care, freedom from arbitrary injurious governmental conduct, and freedom from deliberately

indifferent conscious shocking behavior" were violated by Defendant Jeffrey Coombe on July 3, 2002. (Pl.'s Opp. Mots. Summ. J. p. 35.) The rights at issue are guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution[4] and Article 24 of the Maryland Declaration of Rights.[5] Waybright's Fourteenth Amendment rights, moreover, are secured by 42 U.S.C. § 1983, which provides a remedy against any person who, under color of state law, deprives another of rights protected by the United States Constitution.[6]

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4. The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV.

5. Article 24 of the Maryland Declaration of Rights provides that "no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land." Md. Const. Declaration of Rights, Art. 24.

6. 42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at

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II. Qualified Immunity.

Coombe asserts the defense of qualified immunity with respect to Plaintiffs' federal constitutional claims. Under that doctrine, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). As the United States Court of Appeals for the Fourth Circuit recently emphasized, any qualified immunity analysis involves two steps:

First, we must determine, "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). Only if the answer is "yes" do we advance to "the next, sequential step," which is "to ask whether the right asserted was clearly established" at the time of the events at issue. *Id.* We conduct this latter inquiry by determining whether a reasonable officer would have understood that his conduct violated the asserted right. *Id.* at 202, 121

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> law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

S.Ct. 2151. "[T]he answer to both Saucier questions must be in the affirmative in order for a plaintiff to defeat a defendant police officer's motion for summary judgment on qualified immunity grounds." *Clem v. Corbeau*, 284 F.3d 543, 549 (4th Cir.2002).

Miller v. Prince George's County, 475 F.3d 621, 626-27 (4th Cir.2007). Before reaching the first step of the qualified immunity analysis—i.e., whether Coombe's conduct violated Waybright's constitutional rights-this Court must resolve a threshold dispute concerning the standard by which Coombe's conduct should be measured.

III. Standard for Measuring Conduct.

It is well-established that only governmental conduct that "shocks the conscience" amounts to a violation of substantive due process under the Fourteenth Amendment.[7] *County of Sacramento v. Lewis*, 523 U.S. 833, 846, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). Inquiring whether governmental conduct

7. Only one standard applies to alleged violations of substantive due process rights under the Fourteenth Amendment and Article 24. See, e.g., *Pickett v. Sears, Roebuck & Co.*, 365 Md. 67, 775 A.2d 1218, 1224 (2001) ("This Court has interpreted *Article 24* of the Maryland Declaration of Rights and the Due Process clause of the Fourteenth Amendment of the United States Constitution to be in pari materia, such that the interpretations of the Due Process clause of the Fourteenth Amendment provided by the United States Supreme Court serve as persuasive authority for Article 24.").

shocks the conscience is a "threshold question" in cases "challenging executive action on substantive due process grounds. . . ." *Lewis*, 523 U.S. at 847 n. 8, 118 S.Ct. 1708. This inquiry is critical because "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'" *Id.* at 846, 118 S.Ct. 1708 (quoting *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 128, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992)). It also helps to distinguish conduct that violates substantive due process from conduct that is "otherwise clearly actionable" under "state tort laws." *Temkin v. Frederick County Com'rs*, 945 F.2d 716, 720 (4th Cir.1991); see also *Collins, 503 U.S. at 128, 112 S.Ct. 1061* (rejecting the claim that "the Due Process Clause should be interpreted to impose federal duties that are analogous to those traditionally imposed by state tort law.") (citations omitted); *Pinder v. Johnson*, 54 F.3d 1169, 1178 (4th Cir.1995) (declining to recognize a "broad" substantive due process claim "to affirmative protection from the state" because it "would be first step down the slippery slope of liability").

The Supreme Court has emphasized that whether conduct supports a Fourteenth Amendment claim depends on the circumstances of a particular case.

> [L]iability for negligently inflicted harm is categorically beneath the threshold of constitutional due process. It is, on the contrary, behavior at the other end of the culpability spectrum that would most probably support a substantive due process claim;

> conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level. Whether the point of the conscience shocking is reached when injuries are produced with culpability falling within the middle range, following from something more than negligence but less than intentional conduct, such as recklessness or gross negligence, is a matter for closer calls. To be sure, we have expressly recognized the possibility that some official acts in this range may be actionable under the Fourteenth Amendment and our cases have compelled recognition that such conduct is egregious enough to state a substantive due process claim in at least one instance.

Lewis, 523 U.S. at 849, 118 S.Ct. 1708 (citations and quotation marks omitted).

In *Young v. City of Mt. Ranier*, 238 F.3d 567 (4th Cir.2001), the Fourth Circuit echoed the Supreme Court's analysis in Lewis. After observing that "[d]epending on the circumstances, different degrees of fault may rise to the level of conscience-shocking,"*Young*, 238 F.3d at 574, the Fourth Circuit identified the different levels of culpability associated with negligent, deliberately indifferent, and intentional conduct:

> • "[N]egligently inflicted harm" is never viewed as sufficiently shocking to the conscience that such conduct can support a Fourteenth Amendment claim.
>
> • There are limited circumstances where conduct that is "deliberately indifferent"—i.e., conduct that is "more than negligent but less than intentional"-is viewed as sufficiently shocking to the conscience that it can support a Fourteenth Amendment claim.
>
> • Conduct "intended to injure" is most likely to rise to the conscience-shocking level for Fourteenth Amendment purposes.

Id. at 574 (citations omitted); see also *Terrell v. Larson*, 396 F.3d 975, 978 (8th Cir.2005) ("Mere negligence is never sufficient. Proof of intent to harm is usually required, but in some cases, proof of deliberate indifference, an intermediate level of culpability, will satisfy this substantive due process threshold.") (citation omitted); *Lewis*, 523 U.S. at 847, 118 S.Ct. 1708 ("While the measure of what is conscience-shocking is no calibrated yard stick, it does . . . point the way.") (internal quotations marks, alterations, and citation omitted);

In this case, Plaintiffs contend that Coombe's conduct should be measured by the deliberate-indifference standard. Plaintiffs support this contention by invoking three legal theories. First, Plaintiffs contend

that the deliberate-indifference standard should be applied in light of the "special relationship" that existed between Waybright and the Department. Second, Plaintiffs suggest that this standard is appropriate because of the "state created danger" to which Waybright was subjected. Finally, Plaintiffs contend that the deliberate—indifference standard always applies when, as here, the government official involved had an opportunity to actually deliberate. Each of these theories is addressed in further detail below.

A. "Special Relationship" Theory.

The "special relationship" theory is rooted in *DeShaney v. Winnebago County Dept. of Social Svcs.*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989). In that case, the Supreme Court established the general rule that "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *Id.* at 197, 109 S.Ct. 998. The Supreme Court noted, however, that an affirmative duty to protect an individual from harm inflicted by third parties may arise in some circumstances:

> [W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state

> action set by the Eighth Amendment and the Due Process Clause.

DeShaney, 489 U.S. at 200, 109 S.Ct. 998 (citing *Estelle v. Gamble,* 429 U.S. 97, 103-104, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976); *Youngberg v. Romeo,* 457 U.S. 307, 315-16, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982)).

The Fourth Circuit has emphasized that the custodial nature of a special relationship is what gives rise to the government's affirmative duty to protect:

> DeShaney reasoned that "[t]he affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." 489 U.S. at 200, 109 S.Ct. 998. Some sort of confinement of the injured party-incarceration, institutionalization, or the like-is needed to trigger the affirmative duty. *Id.* This Court has consistently read DeShaney to require a custodial context before any affirmative duty can arise under the Due Process Clause.

Pinder, 54 F.3d at 1175 (citations omitted); see also *Walton v. Alexander,* 44 F.3d 1297, 1303 (5th Cir.1995) ("[O]nly when the state, by its affirmative exercise of power, has custody over an individual involuntarily or against his will does a special relationship exist between

the individual and the state.") (emphasis in original; quotation marks and citations omitted). This Court is compelled to note that the "special relationship" theory rooted in the DeShaney opinion and its progeny has been applied almost exclusively in the area of police custody cases. There is no reasonable basis from which a finder of fact could conclude that Andrew Waybright was in a custodial situation on the morning of July 3, 2002 when he was in the midst of firefighter recruit training.

B. "State Created Danger" Theory.

The "state created danger" theory is another exception to the general rule that a state is not liable for the acts of third parties. Under this theory, an affirmative duty to protect arises when the state creates the danger or renders the individual more vulnerable to a danger created by others. See *DeShaney*, 489 U.S. at 201, 109 S.Ct. 998 ("While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them.").

The Fourth Circuit has discussed the state-created-danger theory on at least one occasion:

> When the state itself creates the dangerous situation that resulted in a victim's injury, the absence of a custodial relationship may not be dispositive. In such instances, the state is not merely accused of a failure to act; it becomes much more akin to an actor itself directly

> causing harm to the injured party. At most, these cases stand for the proposition that state actors may not disclaim liability when they themselves throw others to the lions. They do not, by contrast, entitle persons who rely on promises of aid to some greater degree of protection from lions at large.

Pinder, 54 F.3d at 1177 (citations omitted). The Fourth Circuit did not apply the state-created-danger theory in Pinder because that case presented nothing more than a pure "omission claim" where the officer " 'stood by and did nothing when suspicious circumstances dictated a more active role.' " *Id.* at 1175-76 (quoting *DeShaney*, 489 U.S. at 203, 109 S.Ct. 998). In a later unpublished decision, however, the Fourth Circuit recognized the validity of the state-created-danger approach. See *Stevenson ex rel. Stevenson v. Martin County Bd. of Ed.*, 3 Fed.Appx. 25, 31-32, 2001 WL 98358, *5-7 (4th Cir. Feb.6, 2001) (construing DeShaney as setting forth a state-created-danger exception to the general rule that a state is not liable for the acts of third parties).

C. "Opportunity to Deliberate" Theory.

The final theory advanced by Plaintiffs is that "the 'deliberate indifference' test is applied whenever deliberation is practical. . . ." (Pl.'s Opp. Mots. Summ. J. p. 35.) In making this argument, Plaintiffs rely on *Estate of Owensby v. City of Cincinnati*, 414 F.3d 596 (6th Cir.2005), cert. denied, __ U.S. __, 126 S.Ct. 2023,

164 L.Ed.2d 781 (2006). In that case, the United States Court of Appeals for the Sixth Circuit suggested that the amount of time available for actual deliberation is a critical element in deciding whether to apply the intent-to-harm standard or the deliberate-indifference standard:

> In general, the level of culpability required to support section 1983 liability depends upon the circumstances of each case. The determining factor is "whether the circumstances allowed the state actors time to fully consider the potential consequences of their conduct." *Ewolski v. City of Brunswick*, 287 F.3d 492, 510 (6th Cir.2002) (citation and internal quotation marks omitted). The deliberate indifference standard normally applies in cases, like the present one, where a pretrial detainee is alleged to have been denied adequate medical care. In contrast, the heightened standard requiring malice and intent to harm normally applies "when unforeseen circumstances demand an officer's instant judgment," such as in a "high speed vehicle chase." *Ewolski*, 287 F.3d at 511 (citation and internal quotation marks omitted).

Owensby, 414 F.3d at 602-03 (some citations omitted). The Fourth Circuit does not appear to have adopted the approach taken in the Owensby decision.

IV. The Violation of a Constitutional Right.

After carefully considering the matter, this Court finds that none of the legal theories relied on by Plaintiffs apply in this case. First, the evidence does not suggest that a "special relationship" existed between Waybright and the Department. Even if this Court assumes that custody is not required for a special relationship to exist, there are no facts upon which a reasonable fact finder could determine that Waybright's liberty was restricted in any fashion. This Court rejects Plaintiffs' attempt to locate a deprivation of liberty in Coombe's decision to conduct a training run on July 3, 2002. (See Pl.'s Suppl. Resp. p. 5 ("Decedent's supervisor ordered him to run in extreme conditions . . . .").) That decision simply does not involve a deprivation of liberty sufficient to establish a special relationship for substantive due process purposes. See *Pinder*, 54 F.3d at 1175 (noting that a special relationship exists outside the custodial context where there is "[s]ome sort of confinement of the injured party," where individuals are "affirmatively restrained," or where a person's liberty is "otherwise restricted") (citation omitted).

As the United States Court of Appeals for the District of Columbia recently noted in *Estate of Phillips v. District of Columbia*, 455 F.3d 397 (D.C.Cir.2006), the "special relationship" exception cannot be expanded into the public employment context. *Id.* at 406 ("In the public employment context, we have consistently rejected imposing a heightened employer-to-employee

obligation because of the absence of a state-imposed restraint on liberty."). The rights and obligations of public employment are necessarily established by the legislative bodies which establish those public employment positions. This Court cannot by constitutional interpretation establish standards to be followed in public employment training exercises such as the one which led to the tragic death of Andrew Waybright.

Second, Plaintiffs forecast no facts to support the application of the state-created-danger theory. That theory is typically invoked in non-custodial cases where a government official with knowledge of the relevant risks affirmatively forces an individual into a dangerous situation. For example, in *Pullium v. Ceresini*, 221 F.Supp.2d 600 (D.Md.2002), Judge Nickerson of this Court applied the state-created-danger theory where a woman was assaulted after a police officer brought her estranged husband to her home and ordered her to let him in. In distinguishing cases relied upon by the defendants, Judge Nickerson noted that:

> [T]he instant case involves affirmative conduct on the part Officer Ceresini (or another officer under his direction). The officer injected Mr. Pulliam into Plaintiff's home, thus creating a danger where previously none existed. According to the allegations in the Complaint, Mr. Pulliam would not have been in a position to assault Plaintiff if he had not been driven to her home by the officer and if

> the officer had not ordered Plaintiff to admit him, over her repeated and impassioned protestations.

Id. at 604-605. In contrast, there is no suggestion in this case that Waybright was affirmatively forced to participate in the training exercise that resulted in his untimely and tragic death. There is no suggestion, for example, that Coombe ordered Waybright to continue running after he started to experience symptoms of *heat exhaustion*. (Cf. Pl.'s Opp. Mots. Summ. J. p. 10 (Noting that "after Andrew collapsed he . . . tried to crawl on his hands and knees in the direction of the run route and kept saying: 'I want to finish with my class.'") (citation omitted).)

In addition, the Supreme Court has made clear that "the Due Process Clause does not impose an independent federal obligation upon municipalities to provide certain minimal levels of safety and security in the workplace. . . ."*Collins*, 503 U.S. at 130, 112 S.Ct. 1061. It is impossible to square this holding with Plaintiffs' argument that "the fire department created the danger by establishing the completely unsafe training program [that] Andrew Waybright participated in." (Pl.'s Surreply p. 13.) As the Supreme Court has explained:

> We also are not persuaded that the city's alleged failure to train its employees, or to warn them about known risks of harm, was an omission that can properly be

> characterized as arbitrary, or conscience shocking, in a constitutional sense. Petitioner's claim is analogous to a fairly typical state-law tort claim: The city breached its duty of care to her husband by failing to provide a safe work environment. Because the Due Process Clause does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society, we have previously rejected claims that the Due Process Clause should be interpreted to impose federal duties that are analogous to those traditionally imposed by state tort law. The reasoning in those cases applies with special force to claims asserted against public employers because state law, rather than the Federal Constitution, generally governs the substance of the employment relationship.

Collins, 503 U.S. at 128, 112 S.Ct. 1061 (citations and internal quotation marks omitted). In sum, the Department was not constitutionally obliged by the Due Process Clause to protect Waybright from the risks associated with the training program. As a result, there is no basis for applying the state-created-danger theory.

Third, this Court finds that the opportunity-to-deliberate theory also does not apply in the case at bar. As a preliminary matter, this approach to culpability does not appear to have been applied by the Fourth Circuit. More importantly, a thorough review of decisions

invoking this theory strongly suggests that it only applies in the custodial or state-created-danger context. See *Fraternal Order of Police v. Williams*, 375 F.3d 1141, 1146 (D.C.Cir.2004) ("The opportunity for deliberation alone is not sufficient to apply the lower threshold to substantive due process claims. Instead, it is '[b]ecause of ... special circumstances' like custody that 'a State official's deliberate indifference . . . can be truly shocking.'") (quoting *Butera v. District of Columbia*, 235 F.3d 637, 652 (D.C.Cir.2001)) (other citation and internal quotation marks omitted).[8] Accordingly, this Court rejects Plaintiffs argument that the deliberate-indifference standard applies in this case simply because Coombe was in a position to engage in actual deliberation.

This Court finds that the appropriate standard for measuring the conduct of Coombe is the higher intent-to-harm standard, not the lower deliberate-indifference standard. In other words, only if Plaintiffs can establish that Coombe intended to injure Waybright could the governmental conduct at issue be said to "shock the

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8. See also *Ewolski*, 287 F.3d at 511 n. 5 ("[D]eliberate indifference applies in custodial settings because these settings provide the opportunity for reflection and unhurried judgments. Custodial settings, however, are not the only situations in which officials may have a reasonable opportunity to deliberate. 'Like prison officials who are charged with overseeing an inmate's welfare, State officials who create or enhance danger to citizens may also be in a position where 'actual deliberation is practical.' ") (quoting *Butera*, 235 F.3d at 652) (other citations omitted).

conscience." *Lewis*, 523 U.S. at 846, 118 S.Ct. 1708. In this case, there is no genuine dispute that Coombe did not intend to injure Waybright. Regardless of the level of Coombe's alleged negligence, the evidence simply does not permit an inference of intent to harm. As a result, even after construing the evidence in the light most favorable to Plaintiffs, Coombe's conduct cannot "properly be characterized as arbitrary, or conscience shocking, in a constitutional sense." *Collins*, 503 U.S. at 128, 112 S.Ct. 1061. Accordingly, Defendant Coombe's Motion for Summary Judgment with respect to the federal and state constitutional claims in Counts 23-24 of the Second Amended Complaint is GRANTED.[9]

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9. Assuming arguendo that Officer Coombe's actions violated Waybright's substantive due process rights, this Court would consider the second step of the qualified immunity analysis, i.e., were those rights "clearly established" at the time of the events at issue. *Saucier*, 533 U.S at 201, 121 S.Ct. 2151. The Fourth Circuit has remarked that "[t]he extensive debate provoked by this case should be proof enough that the law in this area was anything but clearly established at the time,"*Pinder*, 54 F.3d at 1177, and this Court echoed that very sentiment at the February 17 hearing. There is simply no question that the rights at issue in this matter were not clearly established as of July 3, 2002. See also *Johnson v. Caudill*, 475 F.3d 645, 650 (4th Cir.2007) ("We do not require of such officials the legal knowledge culled 'by the collective hindsight of skilled lawyers and learned judges,' but instead only 'the legal knowledge of an objectively reasonable official in similar circumstances at the time of the challenged conduct.'") (quoting *Jackson v. Long*, 102 F.3d 722, 731 (4th Cir.1996)).

V. The Constitutional Claims Against the Other Defendants.

Plaintiffs' assert causes of action for "supervisory liability" for substantive due process violations against Defendants Walter Murray, Stanley Poole, Mark McNeal, and Andrew Marsh, as supervisors at the Frederick County Department of Fire and Rescue Services, and against the Defendants David Gray, John L. Thompson, Jr., Richard Welden, Jan H. Gardner, and Terre R. Rhoderick, as members of the Board of Commissioners of Frederick County. These claims are asserted under 42 U.S.C. § 1983 and Article 24 of the Maryland Declaration of Rights.

With respect to the allegation of a federal constitutional violation for supervisory liability, this Court has previously summarized the relevant standard:

Section 1983 does not provide for respondeat superior liability; rather, liability is premised "on a recognition that supervisory indifference or tacit authorization of subordinates' misconduct may be a causative factor in the constitutional injuries they inflict on those committed to their care." *Slakan v. Porter, et al.*, 737 F.2d 368, 372 (4th Cir.1984); see also *Carter v. Morris*, 164 F.3d 215, 221 (4th Cir.1999). In order to establish such a claim, "[a] plaintiff must show actual or constructive knowledge of a risk of constitutional injury, deliberate indifference to that risk, and 'an "affirmative causal link" between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff.'

"*Carter*, 164 F.3d at 221 (quoting *Shaw v. Stroud*, 13 F.3d 791 (4th Cir.1994)).

Turner v. Kight, 192 F.Supp.2d 391, 399 (D.Md.2002). In this case, Plaintiffs' claims for supervisory liability fail for at least three reasons. First, as explained above, there is no basis for concluding that the subordinate-in this case, Coombe—committed a constitutional violation. See Discussion supra § IV.

Second, with respect to the first element-actual or constructive knowledge of a risk of constitutional injury—Plaintiffs fail to forecast sufficient evidence. Plaintiffs focus on general problems at the management level but do not proffer evidence that would permit the more specific inference that the supervisors knew or should have known about the risk of constitutional injury. For example, Plaintiffs note that Defendants should have been aware of "incidents prior to July 2002 where fire fighter recruits were injured at the FCDFRS training academy, separate and apart from the normal *ankle sprains* or cuts, and including dehydration, *chest pains*, and *hypertension*." (Pl.'s Opp. Mots. Summ. J. p. 55 (citation omitted).) Plaintiffs also point out that "[e]ach of the supervisory Defendants knew, evidenced by their sworn testimony, that the staffing of instructors was clearly inadequate and, therefore, presented a serious safety risk." (*Id.* at p. 56.) Although such evidence might permit a reasonable juror to conclude that there were problems at the management level, it simply would not support the inference that Coombe's supervisors possessed actual or constructive knowledge

of "conduct that posed 'a pervasive and unreasonable risk' of constitutional injury." *Shaw,* 13 F.3d at 799 (citation omitted).

Finally, Plaintiffs fail to make the requisite showing in connection with the second element of the test for supervisory liability, i.e., deliberate indifference to constitutional risk. As a preliminary matter, this Court has already explained that the deliberate-indifference standard does not apply in this particular context. See Discussion supra § IV. In addition, Plaintiffs fail to forecast any evidence showing that the conduct posing a risk of constitutional injury is widespread. Plaintiffs tacitly acknowledge this point in a later paper by arguing that a showing of widespread conduct is not necessary where actual or constructive knowledge of an unreasonable risk of constitutional injury is demonstrated. (See Pl.'s Surreply p. 22.) As already noted, however, the evidence proffered by Plaintiffs fails to demonstrate such knowledge. See *Slakan v. Porter,* 737 F.2d 368, 373 (4th Cir.1984) ("Ordinarily, [a plaintiff] cannot satisfy his burden of proof [on the second element] by pointing to a single incident or isolated incidents . . . for a supervisor cannot be expected . . . to guard against the deliberate criminal acts of his properly trained employees when he has no basis upon which to anticipate the misconduct.").

In sum, Plaintiffs fail to establish at least two of the elements needed to proceed with a claim for supervisory liability. Accordingly, Defendants' Motion for Summary

Judgment with respect to the federal and state constitutional claims in Counts 25-32, 35-44, and 47 of the Second Amended Complaint is GRANTED.[10]

VI. The State Law Tort Claims.

Defendants also seek summary judgment with respect to Plaintiffs' state causes of action for survival, wrongful death, and loss of solatium. After carefully considering the matter, however, this Court declines to exercise supplemental jurisdiction over those residual state law claims. See 28 U.S.C. § 1367(a); see also *Shanaghan v. Cahill*, 58 F.3d 106, 110 (4th Cir.1995) (noting that "trial courts enjoy wide latitude in determining whether or not to retain jurisdiction over state claims when all federal claims have been extinguished."). This Court has exercised its supplemental jurisdiction over Plaintiffs' state constitutional claims as only one standard applies to both

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10. This Court has previously noted that the Maryland Court of Appeals has held that the protections of the federal and state constitutions are similar, but that there are "different rules" with respect to respondeat superior liability. *Pullium*, 221 F.Supp.2d at 606 (quoting *DiPino v. Davis*, 354 Md. 18, 729 A.2d 354, 371 (1999)). As this Court has determined that Plaintiffs' allegations do not give rise to substantive due process violations, there is no respondeat superior liability with respect to the state constitutional claims. For the same reason, this Court need not address whether Coombe's conduct in this case arose from a policy or custom within the ambit of *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) so as to support the federal constitutional claim against Frederick County.

the federal and state constitutional claims alleging violations of substantive due process rights. See Discussion supra § III at n. 7.

The remaining state law claims involve novel and complex arguments regarding the interplay between the Maryland Workers' Compensation Act, Md.Code Ann., Lab. & Empl. §§ 9-101-1204, the Local Government Tort Claims Act, Md.Code Ann., Cts. & Jud. Proc. §§ 5-301-304, and the Maryland Wrongful Death Act, Md.Code Ann., Cts. & Jud. Proc. §§ 3-901-904. In addition, Judge Julie R. Stevenson Solt of the Circuit Court for Frederick County, Maryland, has already made certain rulings with respect to these claims. See Background supra. Based on the record presently before this Court, moreover, it is difficult to determine the precise impact of those rulings. Therefore, this Court declines to exercise supplemental jurisdiction over Plaintiffs' state law tort claims pursuant to 28 U.S.C. § 1367(c). Accordingly, the state law tort claims set forth in Counts 1-15 of the Second Amended Complaint are REMANDED to the Circuit Court for Frederick County.

Appendix B

CONCLUSION

For the reasons stated above, Defendants' Motions for Summary Judgment are GRANTED-IN-PART and DENIED-IN-PART. Judgment will be entered in favor of Defendants and against Plaintiffs with respect to the Plaintiffs' federal and state constitutional claims under 42 U.S.C. § 1983 and Article 24 of the Maryland Declaration of Rights. Plaintiffs' residual claims based on Maryland tort law, however, will be REMANDED to the Circuit Court for Frederick County, Maryland. A separate Order follows.

APPENDIX C — CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment to the United States Constitution, Section 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 (2000):

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a

declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

110 (2)

No. 08-272

Supreme Court, U.S.
FILED
NOV 3 - 2008
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JAMES WAYBRIGHT, *et al.*,

Petitioners

v.

FREDERICK COUNTY, MARYLAND, DEPARTMENT OF FIRE & RESCUE SERVICES, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioners have presented compelling reasons to grant the Petition where the Fourth Circuit's Opinion affirming the District Court's dismissal of Petitioner's federal constitutional claims does not conflict with a decision of this Court or other courts of appeals, and where the Fourth Circuit's ruling does not implicate an important federal question that has not been settled by this Court.

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STATEMENT OF THE CASE

A. *Factual Background*

Andrew Waybright ("Waybright"), while an employee of the Frederick County, Maryland Department of Fire and Rescue Services ("Department"), died during physical training exercises administered by Respondent Jeffrey Coombe. The exercises were part of a broader training program for Frederick County fire fighter recruits designed to teach and improve upon fire fighting skills. Waybright's injuries were sustained on July 3, 2002, during what was the start of the Department's sixth fire fighter recruit class.

Frederick County's fire fighter recruit program developed in the late 1990's. Development of the recruit program was a product of a mandate requiring already-trained fire fighters to undergo annual refresher training on the operation of the breathing apparatus used when fighting fires. This mandate affected Frederick County's hiring practices with regard to fire fighters.

Specifically, Frederick County could not assume, when hiring trained fire fighters, that the fire fighters had within the previous year undergone the required refresher training. Therefore, when bringing in new hires, even though the new hires were already trained to a certification level of a Fire Fighter I or Fire Fighter II, Frederick County would administer the required refresher training. At the same time, it was decided that the refresher training provided a good

opportunity to evaluate, and perhaps improve upon, the new hires' fire fighting skills, which would benefit Frederick County's fire service and, in turn, the community.

In developing and expanding the program, Department employees visited neighboring jurisdictions to observe the operation of other recruit programs. For instance, Respondent Marc McNeal visited academies located in Howard County, Maryland, Montgomery County, Maryland and Loudoun County, Virginia. Also, Respondent Coombe visited Loudoun County where he observed and participated in that County's academy's physical training program.

The recruit program also benefitted from the Department's membership in the Council of Academies. The Council of Academies is an organization of jurisdictions that conduct state-level fire fighter courses at the local level. Frederick County had been a member of the Council of Academies even before the start of the recruit program, being admitted sometime in the early 1990's. The Council holds monthly meetings where broad ranges of topics are discussed and views shared, including fire fighter training. Those involved with the Department's recruit program attended these meetings.

As the recruit program continued to grow, a decision was made to invite independent instructors to observe the operation of the classes. Specifically, three instructors from Montgomery County's recruit academy were invited to observe a "live burn" exercise. The Department was seeking feedback from these instructors as to any additional safety measures that might be implemented.

Moreover, and specifically pertaining to the physical training aspect of the recruit program, early in the program the Department sent certain individuals, including Respondent McNeal, for specialized training. Specifically, these individuals attended a program and were trained as physical fitness coordinators, though the program through which they were certified would ultimately be discontinued.

With regard to the Frederick County instructors, most came from the field, *i.e.*, from Frederick County fire stations where the instructors worked as fire fighters. Also, sometimes instructors came from neighboring jurisdictions to teach classes.

The recruit program's core curriculum was based upon the curriculum offered by the Maryland Fire and Rescue Institute ("MFRI"). The classes taught at the recruit school followed lesson plans developed by MFRI. For any particular class, the lesson plans established the number of instructors, including support instructors, needed to teach and participate in the class. For instance, to teach a fire suppression class involving a "live burn" exercise, more instructors were needed. At no time were specific recruit classes to be held if the requisite amount of instructors per MFRI were not available. It is notable that as of 2002, MFRI did not offer a fire fighter physical training class.

For Recruit Classes I-VI, the overall administration, which included scheduling and other logistical matters, was carried out by Respondent Stan Poole, Respondent McNeal and a Lieutenant Kevin Finnin. Specifically, Respondent Poole administered Recruit

Classes I and II. Each of these classes lasted approximately two weeks. Respondent McNeal, with Respondent Poole's assistance, administered Class III, which lasted approximately three weeks. Respondent McNeal also administered Recruit Classes IV (approximately four weeks) and V (approximately six to seven weeks), with assistance by Lieutenant Finnin. Class VI, the class in which Waybright was a recruit, was administered by Lieutenant Finnin.

Class VI was scheduled to be the longest program yet, because it was the first class to include both previously-trained fire fighters, like Waybright, and individuals with no previous fire fighting experience. Respondent Poole believed that a longer program would produce better fire fighters. Moreover, it was believed that by offering a recruit class that included spots for those with no prior fire fighting experience, diversity within the Department would be better achieved. A County diversity survey determined that the Department of Fire and Rescue Services was the least diverse.

Recruit Class VI was scheduled for approximately twenty weeks and thirteen recruits had been accepted. Leading up to Class VI, Lieutenant Finnin, due to the increased length of the schedule, voiced concern as to whether there was enough time to schedule the instructors for all the classes before the start of Class VI. Moreover, there was also concern as to whether there were enough available instructors in the field to teach the scheduled classes. Lieutenant Finnin wondered whether the start of Class VI ought to be postponed. These concerns were brought to the attention of Respondent Poole.

Respondent Poole took these concerns under consideration. He realized that if the class was postponed to begin later in 2002, then the funds to pay the instructors to teach the classes may no longer be available. Moreover, he understood that the only way to fill the thirteen vacancies in the Frederick County fire stations was to run the recruit class. If Recruit Class VI were postponed, the vacancies would not be filled. Therefore, Respondent Poole decided to begin Recruit Class VI as scheduled with some changes to its content.

In preparation for Recruit Class VI, the recruit program's instructors attended a safety orientation held at the Training Facility. The orientation was developed by a MFRI instructor, and it covered various safety-related topics. It addressed safety measures to be taken when teaching classes at the Training Facility. All instructors were to attend the orientation, and Respondent Coombe did attend.

Before the start of Class VI, each recruit that had been accepted into the recruit program received a letter. The letter congratulated the recruits on their acceptance into the recruit program. It also directed them to begin acclimating themselves to the present summer weather conditions and to "start hydrating." It was expected from the new recruits that they consume at least one gallon of water daily in order to keep hydrated. It also required the recruits to bring, among other things, "a one-gallon (minimum) water container" to be carried with the recruits at all times for hydration during Recruit Class VI. The letter reiterated what the recruits had already learned while preparing for the Candidate Physical Ability Test

("CPAT"), the test that determined whether the recruits would be accepted into the recruit program.

All recruits had to pass a medical exam and the CPAT in order to be hired, as Waybright had. In preparation for the CPAT, potential recruits attended a CPAT orientation held by the Department and received a Preparation Guide. The Preparation Guide emphasized hydration and it also set forth an exercise program for the potential recruits to follow in order to prepare for the CPAT. At the end of the preparation, the potential recruits were to be able to run "3 miles at an easy pace being sure to be able to talk the entire time." At the CPAT orientation, the recruits were told that, should they pass the CPAT and be hired as a recruit, they were expected to maintain the same level of physical condition in preparation for the start of the recruit program. After passing the CPAT, and after passing a physical medical exam, Recruit Class VI began for the new recruits.

With regard to the physical training portion of the program, Respondent Coombe was the instructor. He had previously served in this same position for Recruit Classes IV and V and, based on past student evaluations, he was one of the highest rated instructors in the program. He was a Fire Fighter III and an emergency medical technician ("EMT"). He had also completed training as a paramedic. As a Fire Fighter III and EMT, Respondent Coombe had years of service and training and was himself a graduate of the Department's Recruit Class II.

On the first day of physical training, Respondent Coombe presented a power point presentation that covered matters relating to health and fitness, safety and hydration. The recruits then went on an approximate 2 mile run and performed calisthenics. This completed the recruits' first day of physical training.

It was during the physical training on the second day of class, July 3, 2002, when Waybright died. On this second day, Waybright, already a trained Fire Fighter II, was an employee of the Department of Fire & Rescue Services and a recruit in Recruit Class VI. One aspect of the recruit program included maintaining the requisite physical fitness needed to perform the job of a fire fighter. Respondent Coombe, leading the physical training that day, worked under the assumption that the recruits had maintained the same level of physical condition needed to pass the CPAT.

As was his practice, about a week before July 3, 2002, Respondent Coombe requested that another instructor be present with him for the physical training exercises. The second person would operate a John Deere four-wheel Gator, which would follow behind Respondent Coombe and the recruits during off-campus training runs. The Gator typically carried a 5-gallon jug of water, medical equipment and a backboard. While the Gator was not used on every off-campus jog, Respondent Coombe intended to use it on July 3, 2002. Also, on longer runs, a radio would be taken.

The Department also had an outdoor weather policy prohibiting outdoor activities when the heat index reached 110 degrees Fahrenheit. The Policy was consistent with accepted fire service practice.

Leaving his house, and upon arriving at the Training Center on July 3, 2002, Respondent Coombe discovered that, despite his request for an additional instructor to follow the off-campus training exercises, no such person was present. Moreover, he discovered that the Gator and radio were unavailable because the keys to access the equipment were locked in a room inaccessible to him. The room was only accessible to those with offices at the Training Center. None of those individuals had yet arrived. These circumstances on July 3 were out of the ordinary; this was the first time Respondent Coombe arrived to conduct physical training exercises to find that those with the keys to access the Training Facility were absent. With Recruit Class VI arriving for their second day of class, Respondent Coombe prepared to move forward.

Respondent Coombe and others carried the 5-gallon water jug to the base of a fire tower located on the Training Facility grounds. Additionally, as they had been instructed to bring, all the recruits had their own gallon bottles of water. The physical training then began at 7:00 a.m.

Respondent Coombe and the recruits started with a half-mile walk. They then commenced an approximate 2.5-3.0 mile run, which ultimately took them to a nearby park and back to the Training Facility. At some point, a Fire Fighter Eckhoff joined Respondent Coombe and the recruits on their run.

Reaching the park, they took a short rest and then began calisthenics. After the calisthenics, they commenced a run of approximately 600-700 yards to the

bottom of a hill in the park. Reaching the bottom of the hill, they assembled for wind sprints up a hill, approximately 300 feet in length, in groups of two. After the wind sprints, Respondent Coombe, Fire Fighter Eckhoff and the recruits took time at the top of the hill to assemble in double-line formation for the jog back to the Training Facility, which was approximately 1000 yards. It was Respondent Coombe's intention upon reaching the Training Facility to complete the physical training for the day with stretching.

However, on the jog back to the Training Facility, Respondent Coombe was notified that Waybright was experiencing problems. Respondent Coombe and Fire Fighter Eckhoff approached Waybright to assess his condition. Waybright was coherent, alert and oriented. He answered all of Respondent Coombe's and Fire Fighter Eckhoff's questions and informed them that he was alright. Waybright continued walking back toward the Training Facility. Waybright, however, then began to stumble, and Respondent Coombe and Fire Fighter Eckhoff asked Waybright to sit down on the grass. Waybright refused, wanting to finish the exercises with his class. Respondent Coombe and Fire Fighter Eckhoff managed to have Waybright sit down, at which time Waybright began to crawl on his hands and knees back toward the Training Facility stating that he wanted to finish with his class. At this point, Respondent Coombe observed that Waybright was exhibiting signs of heat stress necessitating assistance. Respondent Coombe told Fire Fighter Eckhoff to remain with Waybright while Respondent Coombe went back to the Training Facility for help. Respondent Coombe intended to get Waybright in the shade, get him cooled off and get him some liquids.

At the Training Facility, Respondent Coombe instructed a Fire Fighter Grossnickle to take a pick up truck and assist Fire Fighter Eckhoff with Waybright, both of whom were within sight of the Training Facility. Respondent Coombe realized that it was necessary to get Waybright attention. Understanding that Fire Fighters Grossnickle and Eckhoff, both EMTs, could assist Waybright back to the Training Facility, Respondent Coombe returned to his unattended recruits who had previously been instructed to return to the Training Facility grounds and begin stretching.

When Fire Fighter Grossnickle reached Waybright and Fire Fighter Eckhoff, Waybright was unconscious. Fire Fighter Grossnickle, therefore, returned to the Training Facility to alert someone to call 911 and then returned to Waybright. Respondent Coombe dismissed the recruit class, and he, too, returned to Waybright, which was approximately 10-15 minutes after leaving Waybright with Fire Fighter Eckhoff to get help. By then, an ambulance, paramedics and a rescue squad had arrived and CPR was being administered. Waybright was placed in the ambulance, and he was later pronounced dead.

An autopsy was performed by the Medical Examiner to determine Waybright's cause of death. The Report determined the cause to be hyperthermia. Vitreous electrolyte testing revealed no evidence of dehydration.

After the occurrence, physical training during Recruit Class VI was suspended. After Recruit Class VI, there were no more recruit classes until August, 2004.

Respondent Poole responded to the tragedy, the first of its kind, by assembling an independent Board of Inquiry. The Board consisted of eight members who investigated the circumstances of the occurrence. The members included individuals from Frederick County as well as individuals from neighboring jurisdictions, MFRI and the International Association of Fire Fighters. Respondent Walter Murray served as the Chair of the Board.

After an extensive investigation, the Board made certain findings and recommendations. The Board interviewed other recruits in Class VI and determined that many, during the calisthenics on July 3, 2002, felt dizzy or disoriented. It also found that only one of the recruits reported his symptoms to Respondent Coombe during the training. That recruit was directed to rest on a nearby guardrail. There was no finding that Respondent Coombe intended to inflict injury upon any of the recruits or that any of the recruits were threatened against their will to participate.

The Board also determined the temperature and heat index at various points in time during the physical training. It found that at the start of the physical training, the temperature was 75 degrees with the heat index at 80. When the 911 call was placed reporting Waybright's condition, the temperature was 86 degrees with the heat index at 96. The Board found that the Department's Outdoor Weather Policy was consistent with accepted fire service practice and replicated from MFRI recommendations. At no time during the physical training did the heat index exceed the Department's Outdoor Weather Policy or even Petitioners' expert's proposed alternative.

After the Board's investigation, disciplinary proceedings were brought against Respondent Coombe. The proceedings were brought against Respondent Coombe for failing to recognize as an emergency medical technician the seriousness of Waybright's condition and for failure to respond properly to Waybright's condition.

The Board of Inquiry made certain recommendations in an attempt to prevent future occurrences. The recommendations made by the Board were used to revamp the recruit program. Specifically, changes were made to the physical training portion of the program. The Department hired a wellness and fitness coordinator, and physical training activities are now based upon individual assessments of each recruit, which in turn yields a baseline performance level for the entire class. Additionally, before recruits begin a session of physical training, each recruit's blood pressure, heart rate and weight is measured for monitoring purposes.

B. *Procedural Background*

Petitioners, the parents of Waybright, have pursued claims in Maryland's Workers' Compensation Commission, the Circuit Court for Frederick County, Maryland, the United Sates District Court for the District of Maryland and the United States Court of Appeals for the Fourth Circuit.

Petitioners initially sought relief from Maryland's Workers' Compensation Commission ("Commission"). The Commission on August 25, 2003 determined that Petitioners were not partially dependent upon their son, Waybright, for financial support. Petitioners did receive

compensation benefits for medical and funeral expenses, but were denied further benefits because they were found not dependent upon Waybright. Petitioners thereafter filed an appeal of the Commission's decision on the dependency issue (an appeal which is today pending but stayed) and then a lawsuit asserting state tort law claims.

The instant civil lawsuit was initially filed in the Circuit Court for Frederick County, Maryland alleging only state law tort claims sounding in negligence. Because Maryland's workers' compensation law provided Petitioners an exclusive remedy, Respondents moved for summary judgment. The Circuit Court on November 17, 2004, dismissed Petitioners' survival action, as Petitioners' counsel conceded was the correct result during oral argument on the motion, and the Circuit Court advised it would shortly issue its decision on the wrongful death action. With the decision imminent, Petitioners amended their lawsuit to assert constitutional claims.

The constitutional claims in Petitioners' Second Amended Complaint are premised upon alleged omissions that allegedly demonstrate Respondents' "deliberate indifference" to workplace safety (i.e., failure to provide water; failure to provide proper clothing; failure to provide communication devices; failure to provide transportation; failure to provide medical assistance; failure to properly instruct and supervise training officers and employees). (Pet. App. at 40a). The claims arise from Waybright's fatal injuries occurring during physical training exercises led by Respondent Coombe on July 3, 2002, and include allegations of

supervisory liability. There is also a claim of municipal liability against Frederick County.

The Second Amended Complaint does *not* allege, nor is there any evidence, that Respondent Coombe physically assaulted or deliberately intended to injure Waybright, that he confined, detained or in any way restricted Waybright's liberty, or that he threatened or coerced Waybright forcing him to participate in the physical training exercises. Like Waybright's employment with Frederick County, his participation in the training exercise was completely voluntary.

It is significant that Petitioners' claims began in Maryland's Workers' Compensation Commission, because, fundamentally, Petitioners' case rests upon allegations of an unsafe work environment. The District Court recognized this when it said, "It is impossible to square [the holding in *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 112 S.Ct. 1061 (1992)] with Plaintiffs' argument that 'the fire department created the danger by establishing the completely unsafe training program [that] Andrew Waybright participated in.'" (Pet. App. at 48a).

After Petitioners amended their lawsuit to include federal constitutional claims, Respondents removed the case to the United States District Court for the District of Maryland. Over a year of discovery ensued, and Respondents moved for summary judgment.

The District Court on March 1, 2007, entered judgment in favor of Respondents on the federal and state constitutional claims and remanded the state tort

law claims to the Frederick County Circuit Court where those claims remain pending. The District Court found no evidence of conscience-shocking conduct in the constitutional sense committed by Respondent Coombe. (Pet. App. at 51a). Therefore, because the allegations against Respondent Coombe did not support a due process violation, the constitutional claims against the remaining Respondents premised upon supervisory and municipality constitutional liability, also failed. (Pet. App. at 53a). In addition, with respect to the supervisory liability claims, the District Court found neither evidence that the supervisory Respondents had knowledge of conduct posing a risk of constitutional injury nor evidence that any such conduct was widespread. (Pet. App. at 53a-54a). Petitioners took their case next to the United States Court of Appeals for the Fourth Circuit.

The Court of Appeals affirmed in part and reversed in part the ruling of the District Court. With respect to the federal constitutional claims, the Court of Appeals, relying upon well-established law, held that judgment was properly entered in favor of Respondents. (Pet. App. at 20a). The Court found that "under no construction of events could Coombe be said to have intended Waybright's death," and it rejected Petitioners' argument that "deliberate indifference," under the facts of this case, could shock the conscience in a constitutional sense. (Pet. App. at 12a-18a). With respect to the state constitutional claims, the Court of Appeals reversed the District Court's decision and directed that the state constitutional claims be remanded to and decided by the state court. (Pet. App. at 21a).

REASONS FOR DENYING THE PETITION

The decisions of the Court of Appeals and the District Court do not conflict with decisions of this Court or any other courts of appeals. Nor do the decisions implicate a federal question that has not been decided by this Court. To the contrary, the decisions were properly guided by the opinions in *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S. Ct. 1708 (1998) and *Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 112 S. Ct. 1061 (1992). Petitioners, therefore, have not presented any compelling reasons warranting a writ of certiorari.

I. The Decisions of the Court of Appeals and District Court are Consistent with and Properly Guided by the *Lewis* and *Collins* Decisions

The Court of Appeals properly applied the holdings in *Lewis* and *Collins*. Petitioners conjure a holding in *Lewis* that in fact was not made, and they recast the allegations and facts of this case in an attempt to avoid the result dictated by *Collins*.

A. *Lewis* does not hold that, whenever there is time to deliberate, without more, "deliberate indifference" can rise to a conscience shocking level.

Contrary to Petitioners' argument, this Court in *Lewis* did not hold that a state officer's deliberate indifference could be conscience-shocking in the constitutional sense whenever an officer has time to deliberate. (*See* Pet. at 11-12). Rather, the *Lewis* decision

confirmed the long-understood "touchstone of due process," protection of the individual against arbitrary government action. 523 U.S. at 845. The *Lewis* decision further confirmed "the cognizable level of executive abuse of power as that which shocks the conscience." *Id.* at 846.

Petitioners misconstrue the holding in *Lewis* in an attempt to manufacture a conflict between the decisions of the lower courts and this Court's decision in *Lewis*. Petitioners argue that, per *Lewis*, executive action exhibiting the characteristic of "deliberate indifference" might be conscience-shocking whenever there is time to deliberate. (*See* Pet. at 11-12). This was not the holding in *Lewis*.

The Court in *Lewis* held "that high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressible by an action under § 1983." *Id.* at 854. Considering the applicable standard of culpability that might rise to a conscience-shocking level, this Court contrasted the context of a high-speed chase with that of a custodial setting. *Id.* at 851-53. With the custodial setting, a State's deliberate indifference to the needs of a prisoner could be conscience-shocking because "forethought about an inmate's welfare is not only feasible *but obligatory* under a regime that incapacitates a prisoner to exercise ordinary responsibility for his own welfare." *Id.* at 852 (emphasis added). Petitioners fail to appreciate this Court's emphasis on the relevance of the custodial setting. (Pet. at 11-12). It is only when a state imposes a limitation upon a person's freedom that the Constitution

requires the state "to assume some responsibility for his safety and general well-being." *DeShaney v. Winnebago County Dep't. of Social Services*, 489 U.S. 189, 200, 109 S. Ct. 998, 1005-06 (1989). Therefore, deliberate indifference to the safety and well-being of a person in custody may shock the conscience not simply because there was time to deliberate, as Petitioners have argued, but because there is a constitutional requirement to provide for the safety and general well-being of the person in custody. *Lewis*, 523 U.S. at 851. The *Lewis* case did not involve a custodial setting, and this Court determined that deliberate indifference could not rise to the requisite conscience-shocking level. 523 U.S. at 854.

The decision of the Court of Appeals was consistent with and properly guided by *Lewis*. It recognized that only executive conduct that "shocks the conscience" will be "wrong enough to register on a due process scale." (Pet. App. at 11a). It recognized that "[f]or a due process challenge to executive action to succeed, the general rule is that the action must have been 'intended to injure in some way unjustifiable by any government interest.'" (Pet. App. at 11a (quoting *Lewis*, 523 U.S. at 849)). It also recognized that when a due process violation is presented based upon alleged conduct of a lesser culpability than intent to injure, such as deliberate indifference, "an exact analysis" of the circumstances presented must be made "before any abuse of power is condemned as conscience shocking." (Pet. App. at 12a (quoting *Lewis*, 523 U.S. at 850)).

The Court of Appeals undertook an exact analysis of the circumstances presented and correctly held that

deliberate indifference under the facts of this case could not rise to the requisite conscience-shocking level, just as the District Court had held. (Pet. App. at 12a-18a). *Lewis*, therefore, does not supply Petitioners with a compelling reason for grant of a writ of certiorari.

B. Petitioners cannot avoid the result dictated by *Collins*.

It is significant that the first sentence of the opinion of the Court of Appeals indicates that "Andrew Waybright died by accident" (Pet. App. at 3a), because Petitioners, from the start, prior to amending their lawsuit with constitutional claims, have maintained that the death resulted from negligence. (Pet. App. at 5a). Even after amending their lawsuit, Petitioners never asserted that Respondent Coombe intended Waybright's death or even intended to harm Waybright. (*See* Pet. App. at 12a). Furthermore, it is clear that Petitioners' claim all along has premised the alleged constitutional deprivation on the failure of Respondents to provide a safe workplace. Specifically, Petitioners argued before the District Court that "'the fire department created the danger by establishing the completely unsafe training program [that] Andrew Waybright participated in.'" (Pet. App. at 48a (quoting Pls.' Surreply at 13)).

In *Collins*, a widow of a sewer worker who died on the job brought a substantive Due Process claim against the city that employed her husband. 503 U.S. at 117. The widow alleged that: "her husband's death was caused by the City's policy of not providing safety training to its employees; there was a custom for safety equipment to either not be taken to, or used at, the job site; no

warnings or instructions were given on the hazards in entering sewer lines or how to protect against them; several months before her husband's death, his supervisor entered a manhole and was rendered unconscious, placing the City on notice of the risks in sending its employees into the lines; the City systematically and intentionally failed to provide the equipment, training or instruction required by the Texas Hazard Communication Act; and *inter alia*, this pattern of behavior by the City was a custom and policy of deliberate indifference to the Fifth and Fourteenth Amendment rights of its employees." *Collins v. City of Harker Heights, Texas*, 916 F.2d 284 (5th Cir. 1990).

This Court, rejecting the widow's claim, explained:

> Neither the text nor the history of the Due Process Clause supports petitioner's claim that the governmental employer's duty to provide its employees with a safe working environment is a substantive component of the Due Process Clause. '[T]he Due Process Clause of the Fourteenth Amendment was intended to prevent government 'from abusing [its] power, or employing it as an instrument of oppression." [citations omitted]
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> . . .
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> Petitioner's submission that the city violated a federal constitutional obligation to provide its employees with certain minimal levels of safety and security is unprecedented. It is quite different from the constitutional claim

advanced by plaintiffs in several of our prior cases who argued that the State owes a duty to take care of those who have already been deprived of their liberty. . . . [citations omitted] Petitioner cannot maintain, however, that the city deprived Collins of his liberty when it made, and he voluntarily accepted, an offer of employment.

We are also not persuaded that the city's alleged failure to train its employees, or to warn them about known risks of harm, was an omission that can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense. Petitioner's claim is analogous to a fairly typical state-law tort claim: The city breached its duty of care to her husband by failing to provide a safe work environment. Because the Due Process Clause 'does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society,' [citations omitted] we have previously rejected claims that the Due Process Clause should be interpreted to impose federal duties that are analogous to those traditionally imposed by state tort law. . . . [citations omitted] The reasoning in those cases applies with special force to claims asserted against public employers because state law, rather than the Federal Constitution, generally governs the substance of the employment relationship. . . . [citations omitted]

> Our refusal to characterize the city's alleged omission in this case as arbitrary in a constitutional sense rests on the presumption that the administration of government programs is based on a rational decisionmaking process that takes account of competing social, political, and economic forces. [citations omitted] Decisions concerning the allocation of resources to individual programs, such as sewer maintenance, and to particular aspects of those programs, such as the training and compensation of employees, involve a host of policy choices that must be made by locally elected representatives, rather than by federal judges interpreting the basic charter of Government for the entire country. The Due Process Clause 'is not a guarantee against incorrect or ill-advised personnel decisions.' [citations omitted] Nor does it guarantee municipal employees a workplace that is free of unreasonable risks of harm.
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> . . .
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> In sum, we conclude that the Due Process Clause does not impose an independent federal obligation upon municipalities to provide certain minimal levels of safety and security in the workplace and the city's alleged failure to train or to warn its sanitation department employees was not arbitrary in a constitutional sense.

503 U.S. at 126-30.

Attempting to avoid this Court's holding in *Collins*, Petitioners cite two courts of appeals cases: *Jensen v. City of Oxnard*, 145 F.3d 1078 (9th Cir.), *cert. denied*, 525 U.S. 1016 (1998); and *Hawkins v. Holloway*, 316 F.3d 777 (8th Cir. 2003).[1] (Pet. at 14-16). Hoping to set the instant case apart from *Collins*, and thereby manufacture a conflict between the Fourth Circuit's decision *sub judice* and *Collins*, Petitioners now recast the allegations and facts of their case attempting to align their case with *Jensen* and *Hawkins*. The allegations and facts in those cases, however, do not compare.

In *Jensen*, Officer Jensen was shot and killed by a fellow officer, Sergeant Daniel Christian, during a SWAT Unit raid to serve a search warrant. 145 F.3d at 1081. It was undisputed that Sergeant Christian mistook Officer Jensen "for a gun-wielding occupant of the premises and shot him to death." *Id.* at 1082. The Ninth Circuit, within the procedural context of a motion to dismiss, found support in the law for "[t]he allegation that Sergeant Christian, by *intentionally shooting* at a figure he

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1. Respondents also cite *Eddy v. Virgin Islands Water and Power Authority*, 955 F. Supp. 468 (D. VI. 1997), out of the District Court for the Virgin Islands. As a decision from the District Court, it does not present a "compelling reason" for a writ of certiorari. *See* Sup. Ct. R. 10. Moreover, the decision of the District Court, made in the context of a motion to dismiss, found that the complaint "alleged that defendants acted with significantly more than just reckless indifference." 955 F. Supp. at 475. The District Court found "that reasonable minds could find that the defendants at best sanctioned, at worst intended Mr. Eddy's catastrophic injury . . . ." *Id.* Such were not the allegations in the instant case, nor does the record demonstrate any such intentions on the part of the Respondents.

mistook to be an armed criminal, engaged in a Fourth Amendment seizure. . . ." *Id.* at 1083 (emphasis added). The allegations in *Jensen*, therefore, properly stated a violation of a constitutional right: the unreasonable seizure of Officer Jensen through means of excessive and deadly force "intentionally applied." *Id.* at 1082-83.

That it was alleged in *Jensen* that Officer Jensen's Fourth Amendment right was violated is the first point of departure from the instant case, which alleged a violation of the Fourteenth Amendment. Indeed, when distinguishing the facts of *Jensen* from "safe workplace" cases governed by *Collins*, the Ninth Circuit stressed that the *Jensen* case "alleges a particular constitutional violation–Fourth Amendment seizure–which exists independent of the workplace." *Id.* at 1084, n 1. An unconstitutional seizure may exist whenever there "'is a governmental termination of freedom of movement through means intentionally applied' and a 'seizure occurs even when an *unintended* person or thing is the object of the detention or taking.'" *Id.* at 1083 (quoting *Brower v. County of Inyo*, 489 U.S. 593, 596-97, 109 S.Ct. 1378 (1989)) (emphasis added). In *Jensen*, therefore, it was of no moment that Officer Jensen was the "object of detention" while at work, because a constitutional violation occurred once Sergeant Christian intentionally applied the force resulting in the detention.

Petitioners do not claim that Respondent Coombe violated Waybright's Fourth Amendment right to be free from unreasonable seizures. Instead, Petitioners have claimed only that Respondent Coombe's deliberate indifference to Waybright's needs, needs allegedly developing as the result of an "unsafe training program"

(Pet. App. at 48a), amounted to a violation of Mr. Waybright's substantive due process rights. (*See* Pet. App. at 34a and 40a). Quintessentially, Petitioners' case against all Respondents is that they failed to protect Waybright from an unsafe work environment.

The second point of departure from the *Jensen* case is the allegation in *Jensen* of intentional conduct on the part of Sergeant Christian. 145 F.3d at 1082. Attempting to bring their case closer to *Jensen*, Petitioners now characterize their case as one involving "Waybright's right *not* to be *affirmatively* injured by a state actor." (Pet. at 13 (emphasis in original)). Petitioners, however, have never claimed or alleged that Respondent Coombe intended to injure Waybright, nor do the facts, after much discovery, support such a claim. Petitioners' claim has been to this point premised upon alleged omissions allegedly causing an unsafe workplace. The Court of Appeals, with a proper view of the record, rightfully determined that "under no construction of events could Coombe be said to have intended Waybright's death." (Pet. App. at 12a).

The *Hawkins* case similarly involved allegations and facts distinct from this case. In *Hawkins*, it was alleged that a sheriff threatened to shoot employees by pointing a loaded handgun at them. 316 F.3d at 780. The *Hawkins* court, when distinguishing its factual scenario from "safe workplace" cases governed by *Collins*, pointed out that such conduct by a police officer would violate substantive due process rights *regardless* of whether directed toward co-employees or ordinary citizens. *Id.* at 787-88 (citing *Black v. Stephens*, 662 F.2d 181 (3d Cir. 1981), *cert. denied*, 455 U.S. 1008 (1982); *Robinson v. Solano*

County, 278 F.3d 1007 (9th Cir. 2002)). Like *Jensen*, and unlike this case, the alleged conduct at issue in *Hawkins* was intentional and supported a constitutional violation independent of the workplace context. Petitioners' constitutional claim, on the other hand, is premised solely upon allegations of an unsafe workplace, and *Collins* controls such claims.

Considering Petitioners' allegations and the record, the Fourth Circuit properly recognized *Collins* as binding precedent. (Pet. App. at 17a-18a). With respect to *Collins*, the Court of Appeals found it "right on point, for plaintiffs' state-created danger claim, in essence, is that Coombe created an unsafe workplace that caused a prospective employee harm." (Pet. App. at 17a).

II. The Decisions of the Court of Appeals and District Court do Not Conflict with Decisions of Other Courts of Appeals.

The very essence of Petitioners' substantive due process claims are not, of course, that Respondent Coombe affirmatively acted upon Waybright intending his death. Rather, the claims are premised upon his alleged failure to assure that certain precautions were in place while conducting the physical training. Certainly, conducting physical training is not in and of itself unconstitutional. Rather, it is Petitioners' position that conducting training without a ready or adequate supply of water, without communication devices and the like caused a constitutional deprivation, a position which *Collins* has addressed.

Yet, in argument below and now, the Petitioners characterized Waybright's constitutional right at issue as the "right *not* to be *affirmatively* injured by a state actor." (*See* Pet. at 13 (emphasis in original)). Petitioners, therefore, argued for application of the "state-created danger" exception to the general rule that only intentional, malicious conduct will give rise to a constitutional due process claim. Petitioners clearly did so to try to avoid the application of *Collins*. The District Court and the Fourth Circuit correctly rejected Petitioners' argument for application of the deliberate indifference standard *vis-a-vis* a state-created danger because in sum, Petitioners merely claimed that the danger that the Respondents in this case created was a failure to provide a safe workplace. (Pet. App. at 17a).

Now, Petitioners go one step further. They argue that the deliberate indifference standard may be applied, and has been in cases in some of the Circuits, *even without* a special circumstance such as custody or the state created danger. (Pet. at 18). Petitioners know that they must, because arguing merely that the Fourth Circuit and District Court were wrong in failing to apply a properly stated rule of law is "rarely" grounds for issuance of a writ of certiorari. Sup. Ct. R. 10. So, Petitioners now assert a conflict among Circuits by arguing that there is support for applying the deliberate indifference standard even in absence of the state-created danger. As explained below, no such support exists, a fact that serves to uncover Petitioners' true basis for their Petition: their belief that the courts below wrongly decided their case.

The courts of appeals decisions Petitioners cite from the Third, Sixth and Tenth Circuits are consistent with this Court's decision in *DeShaney*, as are the courts of appeals decisions from the District of Columbia and Fourth Circuits. The cases have *not* held that state conduct exhibiting deliberate indifference to a person's needs can rise to a constitutionally conscience-shocking level absent a "limitation which it has imposed on his freedom to act on his own behalf." *See DeShaney*, 489 U.S. at 200.

A. There is no conflict between the Fourth Circuit's decision in this case and decisions from other courts of appeals.

This Court in *DeShaney* has explained that "in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals." 489 U.S. at 198. Describing those circumstances, this Court explained, "The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, *but from the limitation which it has imposed on his freedom to act on his own behalf.*" *Id.* at 200 (emphasis added). The decisions cited by Petitioners do not conflict, but rather are consistent, with *DeShaney* and each other.

1. Third Circuit

Petitioners cite as their first case purportedly evidencing a conflict "between the circuits" *Marvel v. Delaware County*, Civil Action No. 07-5054, 2008 WL 1700536 (E.D. Pa. April 10, 2008). (Pet. at 18). This is

not a published decision by the Court of Appeals for the Third Circuit. It cannot present a "compelling reason" for a writ of certiorari. *See* Sup. Ct. R. 10.

Regardless, the *Marvel* case does not represent a conflict. The Third Circuit recognized the general rule stated in *DeShaney* that "the Due Process Clause does not impose an affirmative obligation on the state to protect its citizens." 2008 WL 1700536, *3. Consistent with *DeShaney*, in the context of a motion to dismiss, the Court found that plaintiffs had stated a claim given the circumstances of the case, which involved a limitation on the freedom of the decedent to act on his own behalf. *Id.* at *7.

The decedent died while participating in a court-mandated community service program. *Id.* at *1,5. The decedent entered into the program "in lieu of trial and conviction and, by the program's express terms, community service was mandated." *Id.* at *5. With respect to the decedent's work assignment, the court emphasized that "the County *required* him to work at a construction site in an Excessive Heat Warning in order to satisfy his requirements." *Id.* at *6 (emphasis added). It was alleged that the County, though requiring the decedent to work in extreme weather conditions, did not provide an adequate supply of water and "did not allow community service workers to use their cell phones to call family members so that they could bring them water." *Id.* at *5. Given the limitations on the decedent's ability to care for himself because he was in custody of the County, and the requirement that the decedent work at the construction site, the court's denial of defendants' motion to dismiss is consistent with

DeShaney. The case does not present a conflict. Waybright's voluntary employment and participation in the physical training program does not remotely equate to the circumstances presented in *Marvel*.

The Petitioners also cite parenthetically the Third Circuit cases of *Rivas v. City of Passaic*, 365 F.3d 181 (3d Cir. 2004), *Ziccardi v. City of Philadelphia*, 288 F.3d 57 (3d Cir. 2002) and *Miller v. City of Philadelphia*, 174 F.3d 368 (3d Cir. 1999). None of these cases present a conflict.

In *Rivas*, the decedent, after having been forcibly restrained, handcuffed and arrested by police officers, sustained fatal injuries. *Id.* at 187, 189. The arrest occurred after paramedics called the police claiming to have been assaulted by the decedent. *Id.* at 196. The Court of Appeals, deciding that a question of fact existed as to whether the paramedics violated the decedent's substantive due process rights, explained that a jury could determine that the paramedics misrepresented to the police that the decedent had assaulted them thereby leading to the decedent's arrest. *Id.* at 196. It further explained that a jury could find that the paramedics failed to inform the police about a possible medical condition of the decedent and abandoned control over the situation once the police restrained the decedent. *Id.* at 197.

Based upon the possible circumstances, which involved a limitation on the decedent's freedom, the Third Circuit held that the paramedics' conduct might shock the conscience if there were evidence that the paramedics "consciously disregarded a great risk of

serious harm. . . ." *Id.* at 196. The facts and the opinion in the *Rivas* case comport with the *DeShaney* opinion, because an affirmative duty possibly existed *because* the decedent was arrested, an arrest caused by the paramedics' alleged fraudulent representations. *Id.* The decision does not represent a conflict among the circuits with respect to the application of the "deliberate indifference" standard.

In fact, the *Rivas* case did not even apply a "deliberate indifference" standard, instead applying a higher standard requiring a showing of conscious disregard of a great risk of serious harm. *Id.* at 202 (concurring opinion) (noting "it is no longer enough that she or he has acted in 'willful disregard' of the plaintiff's safety). On this point, the *Ziccardi* and *Miller* cases similarly present no conflict with respect to application of the "deliberate indifference" standard, because like *Rivas*, the *Ziccardi* and *Miller* cases did not involve application of a "deliberate indifference" standard. *Ziccardi*, 288 F.3d at 67; *Miller*, 174 F.3d at 375-76. Instead, the Court of Appeals in *Ziccardi* and *Miller* applied greater standards of culpability to the facts of those cases (*Ziccardi*, 288 F.3d at 67; *Miller*, 174 F.3d at 375-76), and, thus, do not present compelling reasons to consider, as Petitioner's request, the circuit courts' application of the deliberate indifference standard. (Pet. at 18).

2. Sixth Circuit

Similarly, the cases of *Estate of Owensby v. City of Cincinnati*, 414 F.3d 596 (6th Cir. 2005) and *Ewolski v. City of Brunswick*, 287 F.3d 492 (6th Cir. 2002) are

distinguishable, not conflicting. Petitioners contend that the Sixth Circuit, with these cases, have recognized "deliberate indifference claims" absent "special circumstances (*i.e.*, custody or state-created danger)." (Pet. at 18). This simply is not true.

The *Estate of Owensby* case involved *a custodial situation* where police officers, after making an arrest through brutal means and confining the decedent in a squad car, waited around greeting other officers, straightening their uniforms, picking up dropped items and discussing "the apparent severity of [the decedent's] injuries" without ever attending to the decedent. 414 F.3d at 603. The Sixth Circuit determined that due to the custodial situation and the fact that deliberation upon the need to provide medical attention was possible, "deliberate indifference" could rise to a conscience shocking level. *Id.*

The *Ewolski* case involved a claim based upon a "state-created danger" theory where police officers, involved in a two-day standoff with the decedents, escalated the confrontation, which resulted in a murder-suicide involving a deranged husband, his wife and his son. 287 F.3d at 509. Despite Petitioners' contention, the Sixth Circuit did not apply a deliberate indifference standard absent a "special circumstance" such as a state-created danger. Indeed, *Ewolski* involved affirmative acts by the police escalating the confrontation including a directive that an armored vehicle ram through a living room wall and inject tear gas into the residence. *Id.* at 499. The Court of Appeals, considering the affirmative acts of the police, held that the conduct did not exhibit deliberate indifference to the safety of the hostages. *Id.* at 514.

3. Tenth Circuit

Nor does *Radecki v. Barela*, 146 F.3d 1227 (10th Cir. 1998) represent a conflict in application of the "deliberate indifference" standard. First, the *Radecki* case proceeded on a state-created danger theory, so Petitioners are wrong to suggest that the Tenth Circuit "recognize[d] deliberate indifference claims without a showing of special circumstances (*i.e.*, custody or *state-created danger*)." (Pet. at 18 (emphasis added)). Second, the *Radecki* case never adopted the deliberate indifference standard. 147 F.3d at 1232. To the contrary, the Tenth Circuit applied the higher standard set forth in *Lewis*, the "intent-to-injure" standard. *Id.* Finally, the *Radecki* Court reversed the lower court's denial of defendants' summary judgment motion and entered judgment in favor of the defendants. *Id.* at 1232. It found no constitutional liability. *Id.* It does not conflict with the Fourth Circuit's decision.

III. This case is not ideal for considering application of the "deliberate indifference" standard, because no reasonable jury could conclude that Respondent Coombe's conduct *was* deliberately indifferent.

Reviewing the record, the Fourth Circuit in this case at least suggested, if not explicitly recognized, that Respondent Coombe, once he became aware of Waybright's deteriorating condition, was not deliberately indifferent to Waybright's needs. (Pet. App. at 19a-20a). Rather, Respondent Coombe "did not ignore or disregard Waybright's distress when he learned of it." (Pet. App. at 19a). Again, it was important to the

Fourth Circuit to open its opinion with the fact that "Andrew Waybright died by accident. . . ." (Pet. App. at 3a). The Court recognized that "[a]fter Waybright stood up in an effort to continue, it was Coombe who told him to rest instead," and that "Coombe assigned a second firefighter (one with medical training) to look after Waybright, and told a third firefighter to get a vehicle to pick Waybright up." (Pet. App. at 19a). The Court of Appeals appropriately determined, "This conduct is a far cry from shocking the conscience." (Pet. App. at 19a). Again, Petitioners' initial complaint in state court alleging only negligence was a tacit admission that not even the deliberate indifference standard can be properly met on this record. The lack of evidence of deliberate indifference does not favor a writ of certiorari to consider application of that standard.

CONCLUSION

There are no compelling reasons to grant the Petition for a Writ of Certiorari. For the foregoing reasons, the Petition should be denied.

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No. 08-272

IN THE

Supreme Court of the United States

JAMES WAYBRIGHT, as personal representative and co-executor of the estate of Andrew Waybright (deceased); and SHIRLEY WAYBRIGHT, individually and as personal representative and co-executor of the estate of Andrew Waybright (deceased),

Petitioners,

v.

FREDERICK COUNTY, MARYLAND, DEPARTMENT OF FIRE & RESCUE SERVICES, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF

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REPLY BRIEF FOR PETITIONERS

I. INTRODUCTION

The Fourth and D.C. Circuits (unlike the Third, Sixth and Tenth Circuits) have wrongly applied *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) so as to limit the use of the deliberate indifference test to custodial circumstances alone. The conflict among these circuits is stark and should be resolved by this Court. Respondents have not, and cannot, argue their way around this fundamental truth.

II. THE CONFLICT BETWEEN THE CIRCUITS IS UNDENIABLE.

A. Third Circuit

Respondents fail to appreciate the significance of the Third Circuit's jurisprudence on the standard of culpability. Following *Lewis*, the Third Circuit "had occasion to reflect on the appropriate standard of fault in a number of different settings" described in its decisions. *Sanford v. Stiles*, 456 F.3d 298, 306 (3d Cir. 2006) "Sometimes, an intent to cause harm has been required; other times, deliberate indifference has been sufficient." *Id.*

In *Miller v. City of Philadelphia*, 174 F.3d 368 (3d Cir. 1999) (a non-custodial case involving a social worker acting to separate a parent and child), the Third Circuit "utilized a standard part way between intent to harm and deliberate indifference." *Sanford*, 456 F.3d at 306, citing *Miller*, 174 F.3d at 374-75. The *Miller* court

established three possible standards to determine whether behavior rose to the level of conscience-shocking: deliberate indifference; gross negligence or arbitrariness that "indeed shocks the conscience"; and intent to cause harm. *Miller*, 174 F.3d at 375-76; *Sanford*, 456 F.3d at 306.

Following its decision in *Miller*, the Third Circuit decided *Ziccardi v. City of Philadelphia*, 288 F.3d 57, 58-59 (3d Cir. 2002) (Alito, J.). There, a plaintiff brought a substantive due process claim against two paramedics, asserting that their careless actions in lifting him rendered him a quadriplegic. *Id.* at 60. *Ziccardi* "created a new articulation for the mid-level standard first discussed in *Miller*." *Sanford*, 456 F.3d at 308 n8.

Ziccardi "determined that the language in *Miller* — 'gross negligence or arbitrariness that indeed shocks the conscience' — was not intended as a 'precise articulation.'" *Sanford*, 456 F.3d at 307, citing *Ziccardi*, 288 F.3d at 65. The Third Circuit "attempt[ed] to elucidate and apply the level of culpability required in *Miller* [and] noted that the case appeared to have demanded proof of something less than knowledge that the harm was practically certain but more than knowledge that there was a substantial risk that the harm would occur." *Sanford*, 456 F.3d at 307 (internal quotation marks omitted), citing *Ziccardi*, 288 F.3d at 66.

The court formulated a standard for circumstances where no instantaneous decision is necessary, but where the state actor also does not have the luxury of

proceeding in a deliberate fashion: "A plaintiff must show that the defendant consciously disregarded, not just a substantial risk, but a great risk that serious harm would result." *Id.* (internal quotation marks omitted).[1]

Miller and *Ziccardi* are extremely important because they reflect the Third Circuit's application of the deliberate indifference (and similar) standards in noncustodial circumstances. The instant case reflects the Fourth Circuit's steadfast refusal to do likewise.[2] The

---

1. The Petition cites *Rivas v. City of Passaic*, 365 F.3d 181 (3d Cir. 1999) to illustrate the apparent use of the deliberate indifference standard in a state-created danger substantive due process claim. In *Sanford*, the Third Circuit discussed its decision in *Rivas*:

> We did not explicitly adopt the *Ziccardi* standard in *Rivas*. In fact, it is not altogether clear which standard was applied. For example, at one point after discussing *Ziccardi*, the opinion refers to the only proper test as whether the technicians consciously disregarded 'a substantial risk.' *Rivas*, 365 F.3d at 196. That would indicate use of the deliberate indifference standard. However, given that the opinion speaks deferentially of *Ziccardi*, and that the culpability question is later summarized in terms of a 'great risk of harm,' *id.* at 196, we believe that *Ziccardi* was probably meant to apply.

456 F.3d at 308 n.9

2. Respondents coyly avoid acknowledging the import of these cases by lapsing into literalism: "*Ziccardi* and *Miller* did not involve *application* of a 'deliberate indifference' standard." Br. of Resp'ts at 31 (emphasis supplied).

D.C. Circuit's[3] position is identical to the Fourth's. The conflict on this important issue between the Third Circuit (as well as the Sixth and Tenth Circuits discussed below) on the one hand, and the D.C. and Fourth Circuits on the other, is thus pellucidly clear.

B. Sixth Circuit

Respondents also do not grasp the significance of the key Sixth Circuit case in this area: *Ewolski v. City of Brunswick*, 287 F.3d 492 (6th Cir. 2002). There, the court applied the deliberate indifference test in a police standoff situation. The Sixth Circuit had this to say about the application of the deliberate indifference test in noncustodial circumstances:

> We note that although the issue has never been decided, cases from this circuit decided before *Lewis* have expressed doubt as to whether the deliberate indifference standard should apply in noncustodial settings. *Such doubt, we believe, has been resolved by the Court's opinion in Lewis, which made clear that the key variable is whether actual deliberation is practical, not whether the claimant was in state custody.* As the Court explained, deliberate indifference applies in custodial settings because these settings provide the opportunity for reflection and unhurried judgments. *Lewis*, 523 U.S. at 853, 118 S.Ct. at 1708 (emphasis supplied).

Id. at 512 n.5 (citation and quotation marks omitted).

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3. *See Fraternal Order of Police v. Williams*, 375 F.3d 1141, 1146 (D.C. Cir. 2004).

The Sixth Circuit's opinion patently conflicts with the Fourth Circuit's holding in the instant case. It cannot be gainsaid that there is a deep and clear conflict between these circuits, as there is between the Third Circuit, siding with the Sixth, and the D.C. Circuit, siding with the Fourth.

C. Tenth Circuit

In *Radecki v. Barela*, 146 F.3d 1227 (10th Cir. 1998) the Tenth Circuit considered a § 1983 action brought against a deputy sheriff by the estate of a bystander who had been instructed by the deputy to assist him in subduing a suspect. During a struggle for possession of the deputy's gun, the bystander was fatally shot after the suspect gained possession of the weapon.

The plaintiff proceeded on a state-created danger theory which requires proof of deliberate indifference. The Tenth Circuit considered the bounds of the deliberate indifference standard and plainly did *not* limit its application to custodial circumstances:[4]

> In assessing the constitutionality of law enforcement actions, we now distinguish between emergency action and actions taken after opportunity for reflection. Appropriately, we are required to give great deference to the decisions that necessarily occur in emergency

4. Respondents aver that the Tenth Circuit in *Radecki* "never adopted the deliberate indifference standard." Br. of Resp'ts at 33. Respondents ignore the unambiguous intention of the court going forward *vis-à-vis* the alleged custodial requirement.

> situations. In the many cases that involve 'lawless behavior for which the police were not to blame,' *id.*, we are no longer obliged to try to give meaning to the word "arbitrary" as the district court tried to do.
>
> Henceforth, we look to the nature of the official conduct on the spectrum of culpability that has tort liability at one end. On the opposite, far side of that spectrum is conduct in which the government official intended to cause harm and in which the state lacks any justifiable interest. In emergency situations, only conduct that reaches that far point will shock the conscience and result in constitutional liability. Where the state actor has the luxury to truly deliberate about the decisions he or she is making, something less than unjustifiable intent to harm, such as calculated indifference, may suffice to shock the conscience.

Id. at 1231-32.

D. *Marvel v. Delaware County*

Respondents try to recast the facts of the recently decided *Marvel v. Delaware County*, 2008 WL 1700536 (E.D. Pa. Apr. 10, 2008) to demonstrate that the case is really one involving a custodial situation. Respondents assert that the district court denied the motion to dismiss *Marvel* because the case "involved a limitation on the freedom of the decedent to act on his own behalf." Br. of Resp'ts at 29. There is simply nothing in *Marvel*

that justifies Respondents' assertion. Indeed, Respondents avoid telling the Court that the *Marvel* defendants did *not* treat the case as one involving custody:

> Defendants argue that [the] County Defendants did not appear at Mr. Marvel's home on the morning of August 1st, take him into custody and 'force' him to do anything. Presumably, had David Marvel gotten up on the morning of August 1st and advised the community service coordinators that he was ill or that in his opinion it was too hot for him to work, there would have been little or nothing the County Defendants could have done about it except to advise that he would have to make up the time on another day.

Id. at *6 (internal quotation marks omitted)

Respondents misstate the holding in *Marvel* and the facts that underlie the decision because *Marvel is* this case — and a basis for asserting that the instant case would be viable if it had been brought in Pennsylvania rather than Maryland.[5] The ultimate irony here is that Petitioners and their late son were residents of Pennsylvania at the time of his death.

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5. Petitioners rely on *Marvel* primarily for this reason and not only because (as Respondents suggest) it "evidenc[es] a conflict 'between the circuits." Br. for Resp'ts at 28.

III. THE RESPONDENTS MISREAD THE PRECEDENTS OF THIS AND OTHER COURTS.

Respondents (like the circuit court) cleave to *Collins* as dispositive of this case. What Respondents fail to appreciate is the difference between the negligent act in *Collins* (breach of duty to provide a safe workplace) versus the conscious, reckless act in this case (Coombe's decision to deprive the recruits of water) and in *Jensen v. City of Oxnard*, 145 F.3d 1078 (9th Cir.), *cert. denied*, 525 U.S. 1016 (1998) (shooting of a police officer by a fellow police officer).

The Court put it this way in *Lewis*: "Whether the point of the conscience shocking is reached when injuries are produced with culpability falling within the middle range, following from something more than negligence but less than intentional conduct, such as recklessness or gross negligence, is a matter for closer calls." 523 U.S. at 833 (internal citation and quotation marks omitted).[6]

Moreover, unlike *Collins* (where the state was passive), in the instant case it was the state actor who directly caused the injuries of another state actor. This is an important distinction between *Collins* and the instant case which the Fourth Circuit failed to appreciate.

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6. *See also Central of Georgia Ry. Co. v. Graham*, 220 Ala. 645, 127 So. 213, 216 (1930) ("[I]n the defining of wantonness, there must be a conscious act *or a conscious failure to act*, with a knowledge that injury will probably result, and with a reckless disregard of consequences" (emphasis supplied).

Respondents devote several pages to Petitioners' reliance on *Jensen v. City of Oxnard*, 145 F.3d 1078 (9th Cir.), *cert. denied*, 525 U.S. 1016 (1998). Respondents misstate the key facts of *Jensen* and misapprehend its importance in illustrating the fundamental differences between *Collins* and this case.

In *Jensen*, the widow of police officer Jensen brought a § 1983 action against the city, police chief, police sergeant and others, alleging that the officer's Fourth and Fourteenth Amendment rights were violated when, in the line of duty, he was shot and killed by a fellow officer (Sergeant Christian) who mistook him for an armed criminal. The Eighth Circuit (affirming the district court's denial of a motion to dismiss) held, *inter alia*, "that Sergeant Christian, by intentionally shooting at a figure he mistook to be an armed criminal, engaged in a Fourth Amendment seizure." *Id.* at 1084. The circuit court also found that "if the [defendant] police officials knew Sergeant Christian was likely to inflict a constitutional injury or if their practices and policies showed a '*deliberate indifference*' to the danger such an individual posed, they should be liable under § 1983." *Id.* at 1086-87 (emphasis supplied).

What is important here is the manner in which the Ninth Circuit court in *Jensen* distinguished the case from *Collins*:

> [T]his case is different in one significant way [from *Collins*] — the nature of the injury alleged." *Id.* at 1084. While the safe workplace cases concern the failure of the state adequately to train, prepare, or protect

> government employees from non-state actors, *this* case involves the allegedly intentional or reckless acts of a government employee directed against another government employee.

Id. (footnote omitted, emphasis supplied.)

There is nothing in *Jensen* that suggests the latter overarching principle is in some way limited to Fifth Amendment work-place civil rights violations but not to Fourth Amendment claims (as Respondents appear to argue). Indeed, Mrs. Jensen (like the instant Petitioners) had an equally viable Fifth Amendment claim if she had chosen to assert it.

IV. RESPONDENTS MISSTATE THE EVIDENTIARY RECORD.

Respondents challenge few of the facts asserted by Petitioners and thereby concede their truth. When they do comment on the facts, Respondents misstate them or make affirmative concessions.

Respondents aver that "the Frederick County instructors, most[ly] came from the field, *i.e.*, from Frederick County fire stations where the instructors worked as firefighters." Br. for Resp'ts at 3. In reality, the instructors were officers in their respective firefighter battalions and, except one officer (who was not assigned to Mr. Waybright's recruit class), did not teach physical fitness and had no training in teaching physical fitness.

Respondents say that "[a]t no time were specific recruit classes to be held if the requisite amount of instructors per [the Maryland Fire and Rescue Institute (MFRI)] were not available [and] that as of 2002, MFRI did not offer a firefighter physical training class." *Id.* However, all of the record evidence points to the fact that the "requisite number of instructors" were *not* available to Respondent Coombe on the day that he trained and led Mr. Waybright to his death. Respondents later concede this: "[U]pon arriving at the Training Center on July 3, 2002, Respondent Coombe discovered that, despite his request for an additional instructor to follow the off-campus exercise, no such person was present." Br. for Resp'ts at 8. Moreover, the independent Board of Inquiry (whose members included several of the instant Respondents and MFRI officials), concluded that Respondents did not have the requisite number of instructors. It recommended (among many other things) that the Fire Department should not conduct another recruit class until it had budgeted and obtained funds for sufficient full-time staff and had hired and trained them, and that it must establish minimum staff levels for all physical training exercises.

Respondents claim that Mr. Waybright's recruit class was administered by Lt. Finnin.[7] Br. for Resp'ts at 4. The problem is that on the sweltering day of Mr. Waybright's intense physical exercise, Lt. Finnin had taken the day off, leaving the class in the hands of

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7. Lt. Finnin is not a party to this litigation.

Respondent Coombe, who not only lacked any formal training, but also (as Respondents admit) was unqualified to run such a class on his own. Moreover, the record reveals that "administering" a recruit class and running the physical training portion of a recruit class are wholly separate endeavors. Indeed, Lt. Finnin was among those officers who had warned the Fire Department's Chief months earlier that the recruits were in danger of injury because of the lack of instructors.

Respondents aver that "[b]efore the start of Class VI, each recruit that had been accepted into the recruit program received a letter . . . [which] directed them to begin acclimating themselves to the present summer weather conditions and to 'start hydrating.'" Br. for Resp'ts at 5. It is undisputed, however, that the letter was *not* received by the recruits until, at most, four days before the start of the training program. Even Respondents' expert admitted that this denied the recruits enough time to acclimate themselves to training in hot weather. The Board of Inquiry found that, "[w]ith the letter dated June 21, 2002, and the class starting July 1, 2002, there was little time to accomplish that task."

Respondents go on to say that the letter "also required the recruits to bring, among other things, 'a one-gallon (minimum) water container' to be carried with the recruits at all times for hydration during Recruit Class VI." Br. for Resp'ts at 5. What Respondents fail to tell the Court is that the recruits, before they embarked on their rigorous run, had to leave *all* of their water bottles at the training facility. It was

physically impossible for the recruits to run with the water jugs that they had been told to bring with them. Moreover, after leaving the facility, Respondent Coombe denied the recruits water during their arduous one-hour run in hot weather and no arrangements had been made to provide the recruits water after they left the facility and during or after the actual physical training.

Respondents say that "[t]he Department also had an outdoor weather policy prohibiting outdoor activities when the heat index reached 110 degrees Fahrenheit[,] . . . consistent with accepted fire service practice." Br. for Resp'ts at 7. Respondents avoid admitting that their one-page weather policy was, by all objective standards, completely inadequate. Indeed, following Mr. Waybright's death, Respondents adopted a policy that required suspension of all training activities when the heat index reached 86 degrees, well below the heat index at the time Mr. Waybright died. In its investigation, OSHA found, in part, that the recruits had been exposed to excessive heat and termed the actions of the Respondents "egregious" and "likely to cause death or serious physical harm." Neither Respondent Coombe nor anyone at the training facility monitored the temperature or heat index on the day that Mr. Waybright died.

Respondents' last resort is to cynicism. Respondents argue that "no reasonable jury could conclude that Respondent Coombe's conduct was deliberately indifferent." Br. of Resp'ts at 33. This argument is reverse alchemy.

Respondents here assume that their misconduct toward Mr. Waybright began when he hit the ground and became unconscious. The gravamen of the conduct under consideration, however, are a host of things that Respondent Coombe recklessly did, beginning with his decision to hold a training exercise on the day in question. *See* Pet. at 2-5.

Moreover, the district court never considered whether the evidence was sufficient to establish a deliberate indifference claim against Respondent Coombe. Rather, the district court analyzed the evidence with only custody in mind and, finding that Mr. Waybright was never in custody or forced by Respondent Coombe to engage in the training exercise that culminated in his death, found the evidence wanting. *See Waybright v. Frederick County Md. Dept. of Fire & Rescue Services*, 475 F. Supp. 2d 542, 552-53 (D. Md. 2007).

The Petition sets forth ample record evidence of Respondent Coombe's deliberate indifference for the well-being of Mr. Waybright.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

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